UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

THE OHIO STATE UNIVERSITY MORITZ COLLEGE OF LAW CIVIL CLINIC, and ADVOCATES FOR BASIC LEGAL EQUALITY, INC., Plaintiffs, v. U.S. CUSTOMS AND BORDER PROTECTION, Defendant.	CASE NO. 2:14-cv-2329 JUDGE FROST MAGISTRATE DEAVERS

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO TRANSFER VENUE

Plaintiffs, by and through counsel, respectfully request that the Court deny the Defendant's Motion To Transfer Venue From The U.S. District Court For The Southern District Of Ohio To The Northern District Under 28 U.S.C. §1404(a). (Doc. 10). Defendant has failed to show that such a transfer is proper. A memorandum in support of Plaintiffs' opposition is attached.

Respectfully submitted,

CIVIL LAW CLINIC
MORITZ COLLEGE OF LAW
THE OHIO STATE UNIVERSITY

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MEMORANDUM IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO TRANSFER

BACKGROUND

On August 18, 2014, Plaintiffs The Ohio State University Moritz College of Law Civil Clinic ("Civil Clinic") and Advocates for Basic Legal Equality, Inc. ("ABLE") electronically submitted a Freedom of Information Act Request ("the Request") for records regarding "Sandusky Bay Border Patrol's practices and procedures related to racial profiling." (Exhibit A). Defendant violated the Freedom of Information Act ("FOIA") by failing to respond to the Request within statutory deadlines, failing to perform an adequate search for responsive documents, and wrongfully withholding responsive agency records. Therefore, on November 18, 2014, Plaintiffs filed a complaint for injunctive relief against the United States Customs and Border Protection ("CBP") in the U.S. District Court For the Southern District of Ohio asking this Court to compel the release and disclosure of the requested agency records. (Compl.).

On November 7, 2014, Defendant CBP acknowledged receipt of Plaintiffs' FOIA requests. (Exhibit B). On December 17, 2014, Defendant CBP sent an electronic notification that the tracking number associated with Plaintiffs' FOIA request had changed. (Exhibit C). In a letter dated December 16, 2014, Defendant CBP informed Plaintiffs that the request had been transferred from Sandusky Bay to Detroit Border Patrol Sector. (Exhibit D).[1]

[1] The letter stated that Sandusky CBP is "unable to provide … the requested information; due to the fact the request would be handled by the Border Patrol. The Patrol Agent in Charge at the Sandusky Bay Station has forwarded your request to the Detroit Border Patrol Sector." (Exhibit D).

Plaintiff ABLE is counsel in an unrelated long-standing suit against Defendant in the Northern District of Ohio. On December 10, 2009, two organizational plaintiffs along with twelve individual plaintiffs, represented by ABLE and private co-counsel, filed *Muñiz-Muñiz, et al. v. United States Border Patrol, et al.*, (N.D. Ohio; 3:09-cv-2865) ("*Muñiz*"). (Exhibit E, Affidavit of Mark R. Heller ("Heller Aff.") ¶4). *Muñiz* included a number of constitutional and statutory claims against local and federal defendants. (*Id.* ¶5(a)). On April 25, 2011, the parties filed a Joint Motion for Protective Order regarding documents federal defendants provided to *Muñiz* Plaintiffs. (*Id.* ¶5(c)). The Stipulated Protective Order was approved and entered. (*Id.*) In May 2012, the claims against local defendants were settled. (*Id.* ¶5(b)). Discovery took place between federal defendants and *Muñiz* Plaintiffs prior to July 16, 2012. (*Id.* ¶5(d)). District Judge Zouhary did not review substantive discovery responses except for those attached to subsequently filed Motions to Dismiss and Motions for Summary Judgment. (*Id.* ¶5(h)). On October 19, 2012, Judge Zouhary granted federal defendants' motion to dismiss on sovereign immunity grounds. (*Id.* ¶5(i)). On December 20, 2013, the Sixth Circuit reversed the dismissal. (*Id.* ¶5(j)). On May 27, 2014, Judge Zouhary ruled against federal defendants' remaining grounds for dismissal and summary judgment. (*Id.* at ¶5(k)). *Muñiz* is set for a bench trial commencing in about two months on May 11, 2015. (*Id.* at ¶5(l)).

LEGAL STANDARD

Section 1404(a) authorizes the transfer of a civil action properly venued in one district to another district, "[f]or the convenience of parties and witnesses, in the interest

of justice" so long as the transfer is to a district where the case "might have been brought." 28 U.S.C. § 1404(a). The plaintiff's forum should rarely be disturbed. *Int'l Union of Elec. Radio & Mach. Workers, CIO v. United Elec. Radio & Mach. Workers of Am.*, 192 F.2d 847, 851 (6th Cir. 1951); *see also Hobson v. Princeton-New York Investors, Inc*., 799 F. Supp. 802, 804 (S.D. Ohio 1992) ("A plaintiff's choice of forum is given great weight."). Thus, the party seeking transfer bears the burden of showing that the district to which it seeks to transfer the case is a superior venue to the plaintiff's choice. *Nicol v. Koscinski*, 188 F.2d 537, 537 (6th Cir. 1951) (explaining "unless the balance is strongly in favor of the defendant the plaintiff's choice of forum should rarely be disturbed."). Transfer is improper if it merely shifts the inconvenience from one party to another. *Shanehchian v. Macy's, Inc.*, 251 F.R.D. 287, 292 (S.D. Ohio 2008). For a change of venue to be appropriate, the balance of convenience must weigh strongly in favor of the transfer. *Van Dusen v. Barrack*, 376 U.S. 612, 645-46 (1964) ("Section 1404(a) provides for transfer to a more convenient forum, not to a forum likely to prove equally convenient or inconvenient."); *see also Imperial Products, Inc. v. Endura Products, Inc.*, 109 F. Supp. 2d 809, 818 (S.D. Ohio 2000) (recognizing that § 1404(a) is not meant to merely shift the inconvenience to the plaintiff).

Ultimately, it is in the District Court's discretion to adjudicate motions to transfer according to an "individualized, case-by-case consideration of convenience and fairness." *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988). In deciding whether a moving party has shown transfer is appropriate, the court should consider the private interests of the litigants and the public's interest in the administration of justice. *Moses v. Business Card Express, Inc.*, 929 F.2d 1131, 1137 (6th Cir.1991), *quoting Stewart Org., Inc. v.*

Ricoh Corp., 487 U.S. 22, 30 (1988). The relevant private interests under this Court's decisions include: the Plaintiffs' choice of venue, the nature of the suit, the place of the events involved, the residences of the parties, the relative ease of access to proof, availability of compulsory process of attendance for unwilling witnesses and costs associated with witness attendance, and other factors that make trial of the case easy, expeditious, and inexpensive. *Jamhour v. Scottsdale Ins. Co*., 211 F. Supp. 2d 941, 945-46 (S.D. Ohio 2002). Public interest factors include docket congestion, the burden of trial to a jurisdiction with no relation to the cause of action, the value of holding the trial in a community where the public affected live, and the familiarity of the court with the controlling law. *Id.* at 945.

ARGUMENT

Plaintiffs agree that venue of this action is proper in this Court and in the Northern District of Ohio since both courts are ones "where it might have been brought." (D. Br. at p. 5). Defendant bears the burden of showing that both public and private interests strongly favor transfer. However, Defendant has failed to show that private interests favor transfer for the reasons outlined below. Furthermore, Defendant has shown no public interest factor that warrants impeding the public's right to know "*what their government is up to*" by transferring the case. *Defenders of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d 83, 87 (D.D.C. 2009) (quoting *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)) (emphasis original). A transfer may be more convenient for Defendant- that does not mean this Court should grant it. For the reasons laid out below, transfer is improper in this case.

I. Defendant Fails To Show Any Private Interest Factors Favor Transfer

Defendant failed to show that any private factor favors the transfer of this action to the Northern District of Ohio. The ease of access to both sources of proof and potential witnesses will not be improved by a transfer to the Northern District. Furthermore, the transfer of this cause of action to the Northern District for the purpose of consolidation with the existing *Muñiz* case would be inefficient. The burden of proof is on the movant, not Plaintiffs, and Defendant simply has not met that burden. *Nicol*, 188 F.2d at 537.

A. Ease of Access to Evidence Does Not Favor Transfer

The "relative ease of access to sources of proof" and the "possibility of view of the premises, if view would be appropriate to the action" are among the relevant private interests in a motion to transfer. *Jamhour*, 211 F. Supp. 2d at 945. Defendant fails to specify the location of any written documents or electronic databases, thereby failing to show that the ease of access to proof favors transfer to the Northern District. *See Proctor & Gamble Co. v. Team Technologies, Inc.*, No. 1:12-CV-552, 2012 WL 5903126, at *7 (S.D. Ohio Nov. 26, 2012) (finding that a party moving for a change of venue based on inconvenience or the location of sources of proof should provide specific evidence of inconvenience; failure to provide specific evidence results in the failure to meet the burden to support transfer). Defendant only states generally that the location of records is "primarily" in the Northern District. (D. Br. at p. 6). Further, "view of the "premises" is inappropriate in FOIA cases, where the physical premises are largely irrelevant to the issues at hand.

It is immaterial that Plaintiffs are unable to state that all of the documents requested in their FOIA request are outside of Ohio. *Nicol*, 188 F.2d at 537. However, Plaintiff ABLE's experience in *Muñiz* and correspondence from Defendant CBP strongly suggest that the documents are located either in Detroit or Washington, D.C., on electronic databases. (*See* Heller Aff. ¶5(l); *see also* Exhibit D (referring Plaintiff's FOIA Request to "Detroit Border Patrol Sector")).

FOIA requests primarily and ordinarily result in searches for documents. *Rugiero v. U.S. Dept of Justice*, 257 F.3d 534, 544 (6th Cir. 2001). The location of records alone—especially electronic databases—cannot be a strong factor for transfer. *Armco, Inc. v. Reliance Nat. Ins. Co.*, 1:96–cv–1149, 1997 WL 311474 (S.D. Ohio May 30, 1997) ("[T]he location of documents will rarely weigh in favor of transfer, because documents may be easily photocopied and shipped to wherever the documents are needed.").

Courts in the Southern District of Ohio have noted the ease with which documents can be transferred electronically, and therefore have given the location of records minimal weight. *See, e.g., Int'l Paper Co. v. Goldschmidt*, 872 F. Supp. 2d 624, 634 (S.D. Ohio 2012) (finding that "given the ease with which documents can be transferred electronically, this factor would not be overwhelming"); *Harris v. BNP Paribas*, No. 2:09-CV-691, 2010 WL 1817248, at *4 (S.D. Ohio May 6, 2010). Because Defendant fails to specifically identify the location of documents, which may or may not be in the state of Ohio, the ease of access to proof is identical whether this case is in the Southern District of Ohio or the Northern District of Ohio.

B. Defendant's Witness-Employees Would be Able to Participate in Proceedings in this District

Although the convenience of witnesses is often the most important factor to consider in deciding a motion to transfer under 28 U.S.C. § 1404(a), here it is inapposite: FOIA litigation is almost always resolved by negotiation or dispositive motion supported by affidavits, without live witness testimony or traditional discovery. 15 Wright, Miller & Cooper, *Federal Practice and Procedure*, § 3851 at 415 (2d ed.1986). Defendant concedes that in-court witness appearances are "generally unnecessary in FOIA cases because FOIA cases are typically decided on summary judgment based on declarations of agency employees." (D. Br. at p. 6 *citing Rugiero*, 257 F.3d at 544). If the parties here are unable to reach a settlement, this case will be resolved on dispositive motions supported by affidavits and legal argument, not on witness testimony. *Rugiero*, 257 F.3d at 544.

Even in the unlikely case that the in-court appearance of witnesses becomes necessary, the availability of witnesses in either jurisdiction is irrelevant to Defendant's application to this Court. Witnesses who are employees of a party are entitled less weight under a motion to transfer analysis because the party can require their presence. *Residential Fin. Corp. v. Jacobs*, No. 2:13-CV-1167, 2014 WL 1233089, at *5 (S.D. Ohio Mar. 25, 2014). In this matter, any potential witnesses—those who searched for, reviewed, redacted, or produced documents responsive to Plaintiffs' FOIA request—are Defendant's employees,. As employees of a party, compulsory process should not be required to compel their attendance. *See AMF, Inc. v. Computer Automation, Inc.*, 532 F. Supp. 1335, 1341 (S.D. Ohio 1982) (finding where there was no indication that

compulsory process would be required to compel the attendance of any employee or non-employee witnesses, availability of witnesses is not a relevant consideration).

Defendant provides only a generalized assertion of inconvenience, stating that if witnesses were to appear in court, those employees would "likely" come from the Northern District of Ohio. (D. Br. at p. 6.) Defendant provides no specific evidence of witness inconvenience. *See Proctor & Gamble Co.*, 2012 WL 5903126, at *7. Defendant only offers a generalized assertion revolving around an unlikely contingency. *See Slate Rock Const. Co. v. Admiral Ins. Co.*, No. 2:10-CV-1031, 2011 WL 3841691, at *9 (S.D. Ohio Aug. 30, 2011) (holding that a "generalized assertion" that witnesses reside in or documents are located in the proposed transferee district is generally insufficient to support a change of venue). Here, the considerations of hypothetical witnesses should not govern. Defendant simply has not met the burden.

C. Given the Differences in Procedural Posture and Substantive Claims At Issue, Transfer Would Be Inefficient

Avoiding the multiplicity of litigation makes trial of a case "easy, expedition, and inexpensive." *E.g., Kay v. Nat'l City Mortgage Co.*, 494 F. Supp. 2d 845, 854 (S.D. Ohio 2007). Avoiding multiplicity only weighs in favor of transfer if it actually serves the purpose of making resolution of the lawsuits more efficient. *See Panini S.p.A. v. Burroughs, Inc.*, No. 3:13-CV-081, 2013 WL 3909684, at *13 (S.D. Ohio July 29, 2013). Here, there are both procedural and substantive reasons why transfer would be inefficient.

As a matter of procedural posture, the transfer of the present action to the Northern Ohio District would prove inefficient for the parties and the court. This case

was filed on November 18, 2014- only four months ago. (Compl.). The *Muñiz* case was filed on December 10, 2009- over five years ago. (Heller Aff. ¶4). The two matters are at opposite ends of a case's lifespan- with this matter at the very beginning and *Muñiz* at the tail end. The only discovery currently pending is the deposition of federal defendants' expert, and a bench trial is scheduled before Judge Zouhary commencing May 11, 2015. (*Id.* ¶5(h),(l)). The different procedural postures preclude any chance of efficiently resolving these cases together. Transferring this newly minted action to a long-standing *Muñiz* case is likely to slow both matters down.

Moreover, as a matter of the substantive issues at stake, the Northern District's familiarity with the *Muñiz* case will not give that court any advantage in efficiently resolving the present action. The two cases give rise to two distinct sets of legal issues. *Panini S.p.A*, 2013 WL 3909684 at *13 (deciding that where two cases have different legally relevant factual patterns and causes of actions, transfer is not appropriate). This case arises under the Freedom of Information Act, 5 U.S.C. § 552. The remaining claims in *Muñiz* focus on whether federal Border Patrol Agents stationed in Ohio are profiling Hispanics in violation of the Fourth Amendment's prohibition of unreasonable seizures and the Fifth Amendment's guarantee of equal protection. (Heller Aff. ¶5(a)).

The substantive differences between this case and *Muñiz* preclude any gains in judicial efficiency through transfer. The fundamental purpose of the FOIA is to assist citizens in discovering "*what their government is up to.*" *Defenders of Wildlife*, 623 F. Supp. 2d at 87 (quoting *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)) (emphasis original); *see also Am. Civil Liberties Union of Michigan v. F.B.I.*, 734 F.3d 460, 465 (6th Cir. 2013) (recognizing "dominant objective"

of FOIA is public disclosure). As such, the resolution of a FOIA lawsuit is inherently different from most other civil causes of action. *Am. Civil Liberties Union of Michigan*, 734 F.3d at 465 (recognizing that most FOIA cases are decided on summary judgment because of FOIA cases' "peculiar posture"). Resolving a FOIA suit requires the court to determine whether an agency has conducted an adequate search for the requested documents and has proven that any documents withheld fall into one of those enumerated exceptions. *Id;* 5 U.S.C. § 552(a)(3)(C). To determine whether a search is adequate, the court must consider whether a search could reasonably be expected to produce the requested information. *Rugiero,* 257 F.3d at 547. This determination, then, is request-specific.

The court's role in FOIA litigation is to determine the adequacy of the agency's search in light of the request and to rule on claimed exemptions from disclosure. *Id.* at 547-53. The Northern District's familiarity with the *Muñiz* case will do nothing to expedite the determination as to whether CBP conducted an adequate search. The discovery process in *Muñiz* provides no information as to the method of search CBP conducted to find those documents. Thus, the Northern District is on equal footing with the Southern District when it comes to determining whether an adequate search was performed pursuant to FOIA.

There is little or no overlap in the documents requested in the present cause of action and the documents reviewed by the Northern District in the *Muñiz* case. (Heller Aff. ¶5(e)). The Northern District's familiarity with the *Muñiz* case will not expedite the determination as to whether any requested documents fall into one of FOIA's enumerated exceptions either. Judge Zouhary has not reviewed most of the documents provided in

discovery by the federal defendants in *Muñiz* other than a statistical analysis of data and some documents cited in opposition to federal defendants' dispositive motions. (*Id.* at ¶5(h)). The documents exchanged in discovery in the *Muñiz* case have not been filed with the court. (*Id.* at ¶5(e)). Only notices of service to opposing counsel were filed with the court. (*Id.*)

Transferring this matter to the Northern District would be judicially inefficient. The differences in records requested in this case and in the *Muñiz* discovery process, the fundamentally different legal analysis required in FOIA litigation, the different stages of the cases, and the extensive expense of judicial resources to date in the ongoing *Muñiz* litigation, all undercut Defendant's arguments for transfer. Defendant has not shown that Plaintiffs' preference should be disturbed. Expedience, expense, and finality of adjudication favor retaining this case in the Southern District of Ohio.

II. Defendant Fails To Show Any Public Interest Factors Favor Transfer

Along with the private interests of the litigants, courts are to consider public interests in the administration of justice, including: docket congestion, the burden of trial to a jurisdiction with no relation to the cause of action, the value of holding trial in a community where the public affected live, and the familiarity of the court with controlling law. *Jamhour*, 211 F. Supp. 2d at 945. Defendant offers no evidence that docket congestion or familiarity with controlling law favor transfer. For the reasons stated below, the relationship of the Northern District to the present case does not favor transfer either.

A driving force behind FOIA is the goal of opening up "agency action to the light of public scrutiny." *Abraham & Rose, P.L.C. v. United States*, 138 F.3d 1075, 1078 (6th Cir. 1998) (quoting *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772 (1989)). The "public" contemplated by FOIA is not geographically confined, but rather the national public. *See, e.g.*, FOIA Update, Vol. XIX, No. 3, at 2 (July 23, 2014) (advising agencies that compliance with FOIA requires reports made to the *public* be made at a single World Wide Web site) (emphasis added). That is why any FOIA suit may be brought in the D.C. Circuit regardless of the location of the agency from which records are sought. 5 U.S.C. § 552(a)(4)(B).

Here, then, the Southern District has as much of a connection to the general public contemplated by FOIA as the Northern District does. Defendant suggests that the cause of action has little connection with the chosen forum, and therefore the plaintiff's choice of forum is to be given less weight. (Doc. 10, 5-7). But Defendant mistakes the cause of action giving rise to this FOIA. It is not the factual events that gave rise to the *Muñiz* litigation. Rather, it is Defendant's failure to respond to Plaintiffs' records request as required by FOIA. 5 U.S.C. § 552(a)(6)(A). The legal issue to be resolved in this case does not rest on factual events that occurred in the Northern District, but on documents and records, and the Southern District has indicated it does not find the location of documents and records alone favors transfer. *Armco, Inc. v. Reliance Nat. Ins. Co.*, 1:96–cv–1149, 1997 WL 311474 (S.D. Ohio May 30, 1997); *Int'l Paper Co.*, 872 F. Supp. at 634; *Harris v. BNP Paribas*, No. 2:09-CV-691, 2010 WL 1817248, at *4 (S.D. Ohio May 6, 2010). Accordingly, the cause of action is sufficiently related to the Southern District of Ohio for Plaintiffs' choice of venue to be respected. Even if this were not the case, the

burden on the Southern District would be minimal. FOIA cases are almost uniformly decided on dispositive motions with no jury or bench trial involved. *Georgacarakos v. F.B.I.*, 908 F. Supp. 2d 176, 180 (D.D.C. 2012) ("FOIA cases typically and appropriately are decided on motions for summary judgment.") (quoting *Defenders of Wildlife v. U.S. Border Patrol*, 623 F.Supp.2d 83, 87 (D.D.C.2009)).

Finally, because the present cause of action arises purely under federal law, the Southern District and Northern District are equally familiar with the controlling law. 5 U.S.C. § 552. This factor weighs against the motion to transfer. Because Defendant offers no evidence to show docket congestion favors a transfer to the Northern District, this factor merits no consideration.

CONCLUSION

For the reasons stated herein Plaintiffs respectfully request that Defendant's Motion for Transfer be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 26, 2015, I electronically filed the foregoing Plaintiffs' Opposition to Defendant's Motion to Transfer Venue with the attached exhibits using the Court's EM/EDF system, which will serve opposing counsel.

February 26, 2015

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