



As a result of Defendants' lack of responsiveness, Plaintiff filed this lawsuit on October 1, 2019. [Doc. 1]. Defendants filed their Answer on November 6, 2019 – largely admitting to Plaintiff's allegations. [Doc. 15]. Defendants' answer corroborates Plaintiff's allegations and, for that reason, Plaintiff requests this Court enter judgment for Plaintiff and order immediate disclosure.

After all, Plaintiff is not facing a delay of a few days – he has had to wait for almost a year and a half without a single determination or document to show for his patience. His investigative work has been fundamentally impeded in contravention of the clear purpose of the FOIA – to “pierce the administrative secrecy and to open agency action to the light of public scrutiny.” *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976). When agencies so flagrantly “violate the intent and purpose of the FOIA . . . the courts have a duty to prevent [such] abuses.” *Elec. Privacy Info. Ctr. v. DOJ*, 416 F.Supp. 2d 30, 35 (D.D.C. 2006) (quoting *Payne Enters. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988)).

### **ARGUMENTS AND AUTHORITIES**

#### **THIS COURT SHOULD ORDER DEFENDANTS TO DISCLOSE THE RECORDS BY ENTERING JUDGMENT ON THE PLEADINGS.**

Defendants' Answer to this lawsuit establishes Plaintiff's right to relief under the FOIA and fails to set forth any defense for the failure to produce the records sought. Therefore, the Court may order production of these records by entering judgment on the pleadings.

The FOIA provides a statutory right to examine an agency's records upon the submission of a request that reasonably describes the records. 5 U.S.C. § 552(a)(3). “An agency must disclose agency records to any person under § 552(a), ‘unless they may be withheld pursuant to one of the nine enumerated exemptions listed in § 552(b).’” *United States v. Tax Analysts*, 492 U.S. 136, 150-51 (1989) (quoting *Department of Justice v. Julian*, 486 U.S. 1, 8 (1988)). Moreover, upon receiving such a request, the statute provides that the agency “shall make the records promptly

available,” 5 U.S.C. § 552(a)(3), and shall “determine within twenty days (excepting Saturdays, Sundays, and legal public holidays) after receipt of any such request whether to comply with such a request and shall immediately notify the person making such request of such determination and the reasons therefor . . .” *Id.* at 552(a)(6)(A)(i).

Defendants’ own Answer to the Complaint shows that Defendants expressly admitted or have not denied that Plaintiff submitted requests for records for upwards of eighteen months ago, but Defendants have failed to release the documents or provide the determination required by the statute. Consequently, the essential allegations on which Plaintiff bears the burden of proof are admitted.

Specifically, Defendants’ Answer concedes Plaintiff’s allegations that:

- (1) The Court has jurisdiction over this action, [Doc. 1, ¶8, Doc. 15 ¶8];
- (2) Defendants are agencies subject to the FOIA, [Doc. 1 ¶¶15, 16, 17, Doc. 15 ¶¶15, 16, 17];
- (3) Defendant CBP has not made a determination nor produced any documents responsive to Plaintiff’s June 16, 2018 request no. CBP-2018-064544, [Doc. 1 ¶25, Doc. 15 ¶25];
- (4) Defendant ICE has not produced documents responsive to Plaintiff’s June 22, 2018 request, [Doc. 1 ¶34, Doc. 15 ¶34];
- (5) Defendant HHS has not made a determination nor produced any documents responsive to Plaintiff’s June 22, 2018 request no. 2018-01128-FOIA-OS, [Doc. 1 ¶41, Doc. 15 ¶41];
- (6) Defendant CBP has not made a determination nor responded to Plaintiff’s November 11, 2018 request no. CBP-2019-010211, [Doc. 1 ¶45, Doc. 15 ¶45].
- (7) Defendant ICE has not produced any documents responsive to Plaintiff’s March 29, 2019 request, [Doc. 1 ¶51, Doc. 15 ¶51].

Defendant ICE does not admit that it failed to provide a FOIA determination to Plaintiff's June 22, 2018 and March 29, 2019 requests. [Doc. 15 ¶¶34, 51]. However, Defendant ICE's own admissions elsewhere in Defendants' Answer makes clear – as a matter of law – that ICE did not provide a FOIA determination that complies with the law to either of these requests.

Regarding Plaintiff's Second Request, Defendant ICE admits to the existence and authentication of communications that it sent Plaintiff on June 27, 2018, [Doc. 15 ¶27], on July 19, 2019, [*Id.* at ¶31], and on July 29, 2019, [*Id.* at ¶32]. Each of these are fully attached as Exhibits to Plaintiff's Original Complaint as Exhibits Nos. 7, 9, and 10. However, none of these communications – on their face – constitute a “determination” as required under 5 U.S.C. § 552(a)(6)(A)(i). *Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm'n*, 711 F.3d 180, 184-90 (D.C. Cir. 2013) (holding that the FOIA requires a determination be made within the required time period and, at a minimum, set forth the scope of the documents that the agency will produce and the scope of documents that the agency “plans to withhold under any FOIA exemptions.”).

Similarly, regarding Plaintiff's Fifth Request, Defendant ICE admits to the existence and authentication of communications that it sent Plaintiff on April 9, 2019, [Doc. 15 ¶47], and on April 24, 2019, [*Id.* at ¶49]. Each of these are fully attached as Exhibits to Plaintiff's Original Complaint as Exhibits Nos. 21 and 23. Again, neither of these communications – on their face – constitute a “determination” as required under the FOIA.

Therefore, Defendants have admitted on the face of their Answer that they have failed to provide Plaintiff with any “determination” or timely production of records in response to Plaintiff's five FOIA requests over the last eighteen months.

Next, Defendants' Answer provides no information – nor sets forth an affirmative defense – that their delays are justified. It is obvious that the twenty working days allowed for all

Defendants have long since elapsed. Consequently, all the elements of Plaintiff's *prima facie* case under the FOIA are admitted in the pleadings. The burden of pleading and proving that Defendants have a basis for delaying their response, or that substantive exemptions apply, clearly falls on Defendants. *E.g. United States Dep't of Justice v. Ray*, 502 U.S. 164, 174 (1991); *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989). Defendants have simply not alleged – with any particularity – that any of the exemptions under the FOIA cover these records, nor have Defendants set forth allegations that would justify their delay in responding to the various requests.

The FOIA provides for an extension of the twenty-working day deadline of up to ten days if there are "unusual circumstances" and the agency provides written notice of how many additional days are necessary to process the request. 5 U.S.C. § 552(a)(6)(B)(i). Defendants have not alleged that such "unusual circumstances" exist here. Moreover, even if Defendants alleged "unusual circumstances," the additional ten-day period has long since expired.

Finally, the FOIA also provides that additional delay be permitted by a court "[i]f the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request." *Id.* § 552(a)(6)(C); *see Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976). If Defendants require an extension of more than ten days, they must have provided written notice to the requester and "shall provide the person an opportunity to arrange with the agency an alternative time frame for processing the request or modified request." 5 U.S.C. §552(a)(6)(B)(ii). The case law makes clear that Defendants have the burden of proving "exceptional circumstances" and "due diligence." *Morrow v. FBI*, 2 F.3d 642, 644 (5<sup>th</sup> Cir. 1993) (FBI had "the burden of establishing that it exercised due diligence in not processing" request within statutory time limit). Defendants have identified no "exceptional circumstances" justifying their extreme delay in processing these unexceptional requests, see § 552(a)(6)(C). Defendants, moreover, have not pled or proven that they exercised "due diligence"

in responding to the request at issue. Defendants also have not issued the written notice required by 5 U.S.C. § 552(a)(6)(B)(ii), providing the requester an opportunity to arrange a specific time limit for production of the requested materials. Because Defendants have not even alleged in the Answer that these defenses apply, there is no justification for the agency's failure to respond.

Therefore, because Defendants admit that Plaintiff has met his *prima facie* burden to prove his claim under the FOIA, Plaintiff respectfully requests that the Court enter an order of judgment on the pleadings and order immediate disclosure of the requested documents.

### CONCLUSION

Because the pleadings concede the essential elements of Plaintiff's FOIA claim, and fail to plead any defenses that would justify their failure to respond, Plaintiff respectfully requests that the Court enter judgment on the pleadings and orders Defendants to produce the requested records immediately.

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Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that on December 18, 2019 I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing to attorneys of record for Defendants, in accordance with the Federal Rules of Civil Procedure.

/s/ Lynn Coyle  
Lynn Coyle