

Robert Moore is a decorated non-profit journalist known for timely and cutting-edge journalism in the borderlands region. During 2018, he submitted numerous requests to the federal government under the Freedom of Information Act (“FOIA”) seeking information regarding critical topics of public interest in the border. His requests sought information so he could provide the public with timely and valuable information about family separation by the Trump Administration; treatment of asylum seekers; voter intimidation in El Paso by CBP on and around the November 6, 2018 election; and hunger strikers. [Doc. 1, Pl’s Orig Compl, ¶¶18-51].

Moore’s work relies upon and requires reasonable access to public records – something that the FOIA guarantees. The FOIA requires that, within twenty days, agencies provide a requester with a determination of what documents exist, when those documents will be produced, and identification of any documents that will be withheld on the basis of an exemption under law. 5 U.S.C. § 552(a)(6)(A)(i). The FOIA requires that the agency makes records “promptly available.” 5 U.S.C. § 552(a)(3)(A).

Here, Defendants ignored the law and violated the FOIA. All Defendants refused to search for or provide any determination regarding Moore’s requests until more than 18 months after Moore’s first request. [Doc. 30, Defs’ Status Report and Unopposed Mot for Stay, p. 2-3] (noting that any searches were not conducted until initiation of this lawsuit). All Defendants failed to produce a single document until this Court entered a production schedule following agreements of counsel. [*Id.*].

ICE completed its search and produced all responsive records only after suit and the order of this Court. [Doc. 39, Defs’ June 3, 2020 Status Report, p. 1]. However, in the past six months, the other two agencies have produced almost no documents, HHS failed to identify responsive

documents until June 2020, and CBP has failed to even start a search for documents on the basis of Moore's oldest request submitted on June 16, 2018.

Over 24 months (or over 750 days) have passed since Moore made his first request to CBP on June 16, 2018 (CBP-2018-064544) and his second request to HHS (19-F-0410) on June 22, 2018. [Doc. 1, ¶¶18-25; 35-41]. Moore has still not received a single document from request no. CBP-2018-064544 and only 7 pages from request no. 19-F-0410. Similarly, Moore submitted a request to CBP (CBP-OFO-2019-010211) on November 11, 2018 seeking intra-agency communications in a five-week period regarding a discrete topic mentioned in CBP's own press release. [*Id.* at ¶¶42-45]. At this time, about 600 days since request no. CBP-OFO-2019-010211 was made, CBP has: (1) failed to identify how many responsive pages exist – instead, identifying the responses in terms of “documents” rather than “pages”; and, (2) failed to produce more than 10 pages of responsive material received on June 29, 2020. [Doc. 39, p. 2]; Ex. A, Letter from CBP to Robert Moore, June 29, 2020.

B. Defendants HHS and CBP have failed to conduct reasonable searches and/or a reasonable production schedule.

After the filing of this lawsuit, and given the total silence from each federal agency for over a year, Moore filed a Motion for Judgment on the Pleadings on December 18, 2020 – seeking the Court's judgment on the sole basis of Defendants' answer, compelling production in a timely fashion, and hoping to avoid discovery. [Doc. 26]. Defendants' counsel and Plaintiff's counsel engaged in good faith discussions in January 2020. As a result of these conversations, Defendants filed a Status Report and Unopposed Motion to Stay Deadline for Defendants to Respond to Moore's Motion for Judgment on the Pleadings. [Doc. 30].

Moore agreed not to oppose a motion for stay of Defendants' deadline to respond to Moore's Motion for Judgment on the Pleadings only because Defendants made certain

commitments to Moore and this Court. [*Id.* at p. 3-4]. Moore agreed not to oppose this motion based on the commitment of the agencies that they: (1) would “complete their searches” by February 7, 2020 [*Id.*]; release records by March 30, 2020 [*Id.*]; and conduct rolling production on a 30 day basis only if “agreed to by the parties or good cause shown to the Court.” [*Id.*]. Moore agreed to this with the understanding that production would be made on a rolling basis “only if needed.” Ex. B, Email from Manuel Romero to Christopher Benoit, Jan. 17, 2020. Defendants stated that they would aim “to have all searches completed and records released before our first production date.” *Id.*

Defendants HHS and CBP failed to keep their promises. First, Moore’s request to HHS (19-F-0410) sought a Memorandum of Agreement and communications regarding that agreement. HHS produced the agreement on January 8, 2020 – 19 months after the request was made. Ex. C, Letter from HHS to Robert Moore, Jan. 8, 2020. HHS then claimed on April 6 that its search was done and no records were found; but its search was based on parameters that were improper on their face. Ex. D, HHS letter to Robert Moore, Apr. 6, 2020; Ex. E, Email from Christopher Benoit to Manuel Romero, May 13, 2020. As a result of Moore’s correspondence, HHS subsequently conducted a third search but has still failed to produce a single document responsive to that search. [Doc. 39, Defs’ Status Report, June 3, 2020]. Nor has HHS committed to a production schedule in which to respond to produce these documents.

Second, CBP received Moore’s request no. CBP-2018-064544 on June 16, 2018 seeking communications that spanned a six-month period regarding the Trump Administration’s efforts to restrict asylum seekers from entering the country. [Doc. 1, ¶¶18-25]. In April and May 2020, CBP reported to this Court that it lacked “available data space” and has failed to even transfer documents to the FOIA division to review. [Doc. 35, Defs’ Status Report, p. 2, Apr. 3, 2020; Doc. 37, Defs’

Status Report, p. 2, May 4, 2020]. CBP has reported for six months that CBP – an agency with an \$18.2 billion annual budget – has been unable to find “external hard drives, shared or other drives” to transfer the files from one office to another. [Doc. 35, p. 2]; Congressional Research Service, *Comparing DHS Component Funding FY2020: In Brief*, p. 4 (Jan. 3, 2020) (available at: <https://fas.org/sgp/crs/homsec/R45972.pdf>). Six months since this Court’s order, CBP has refused to tell Moore how many records it has searched – much less a date for completion. In fact, CBP failed to even provide a report to this Court regarding request no. CBP-2018-064544 in its June 3 Status Report. [Doc. 39].

Finally, CBP received Moore’s request no. CBP-2019-010211 on November 11, 2018 seeking limited communications – over only a five-week period – on a discrete topic publicized in a press release by CBP. [Doc. 1, ¶¶42-45]. Nineteen months later, CBP lists that it has found “8,358 documents” but has refused to identify how many pages are still outstanding. CBP claims to have reviewed between 673 and 773 pages per month but has only produced 10 documents. [Doc. 39, p. 2]; Ex. C. CBP has failed to explain why so many documents are unresponsive and why it is producing documents at such a low trickle. Of course, CBP has failed to commit to a production schedule for this request.

A free press cannot do its job when it is left without transparent and timely access to public records. “The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.” *Center for Public Integrity v. U.S. Dep’t of Defense*, 411 F.Supp. 3d 5, 15 (D.D.C. 2019) (citing *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)). Defendants’ actions in this litigation have turned the principles and provisions of the FOIA on its head and have left our community weaker as a result.

II. ARGUMENTS AND AUTHORITIES

A. Defendants HHS and CBP have not complied with the production schedule entered into by this Court and have failed to make responsive records “promptly available.”

The FOIA statute requires that an agency make a determination on a FOIA request within twenty business days, unless the agency invokes an additional ten-day extension for requests involving “unusual circumstances.” 5 U.S.C. § 552(a)(4)(A)(viii)(II)(aa). An agency’s failure to comply with the statutory timeframe to make a determination means a requester has exhausted its administrative remedies and can directly seek review in federal district court. 5 U.S.C. § 552(a)(4)(B); *Protect Democracy Project, Inc. v. U.S. Dep’t of Defense*, 263 F. Supp. 3d 293, 301 (D.D.C. 2017). The production of records must follow “...within days or a few weeks of a ‘determination,’ not months or years.” See *Citizens for Responsibility and Ethics in Washington v. Federal Election Com’n*, 711 F.3d 180, 283 (D.C. Cir. 2013); *Seavey v. Department of Justice*, 266 F.Supp.3d 241, 244 (D.D.C. 2017).

The parties agreed to a production schedule and submitted that production schedule to this Court in January 2020. [Doc. 30] (“The parties jointly and respectively propose taking time to allow each defendant to complete their searches or processing of any responsive records . . .”). This Court ordered a stay on the Motion for Judgment of Pleadings at a time when the parties believed that the use of a rolling basis of production would be limited, if needed at all. [Doc. 31]. The Court ordered the Defendants to conduct all searches by February 7. [*Id.*].

Now, over six months later and 24 months after the initial requests were made, HHS only recently conducted a substantive search. CBP claims to have conducted a search for CBP-2018-064544 but has not provided Moore or the Court with a single detail about the parameters of that search. CBP failed to even provide a report to this Court regarding this request in its June 3 Status Report. [Doc. 39]. Finally, CBP has fully dragged its heels on production of documents responsive

to the narrow request no. CBP-2019-010211 – failing to tell Moore or the Court how many pages exist and producing only 10 documents in six months.¹

The parties agreed to rolling production only if “agreed to by the parties or good cause shown to the court.” [Doc. 30, p. 4]. CBP and HHS have failed to comply with the Court’s order of January 22, 2020 and have failed to comply with the FOIA in finalizing production. For this reason, Moore withdraws any agreement he had to a continued stay and requests that the Court lift the January stay on Defendants’ deadline to respond to the motion for judgment on the pleadings.

B. Defendants HHS and CBP should be ordered to: (1) identify the full range of responsive records in terms of pages; and (2) produce all responsive records to Plaintiff’s three outstanding requests as outlined below.

Because Defendants HHS and CBP have not complied with the Court’s January Order, it is appropriate to order Defendants to identify the full range of responsive records searched and produce all responsive records as established below.

The principle dispute before the Court is whether Defendants have unbridled discretion under the FOIA to dictate the pace at which they will search for and produce responsive records – despite the Act’s command that agencies in possession of responsive records make them “promptly available.” 5 U.S.C. § 552(a)(3)(A). *See also Citizens for Responsibility and Ethics in Washington*, 711 F.3d at 283. The Court has “equitable powers to order agencies to act within a particular timeframe.” *Landmark Legal Foundation v. EPA*, 910 F. Supp. 2d 270, 275 (D.D.C. 2012). The Court has the inherent power pursuant to Fed. R. Civ. P. 16(b)(1)(B) & 16(b)(3)(B)(vii) to enter

¹ It is worth noting that the 2019 Chief Freedom of Information Act Officer Report for DHS – which covers FY2018 which is when Moore’s requests were submitted – reports that CBP’s FOIA office completed request responses in the following timelines: a median of 33 days; an average number of days of 43.35 days; and the highest number of days to respond was 749. Dep’t of Homeland Security, *2019 Chief Freedom of Information Act Officer Report*, p. 33 (April 2019), https://www.dhs.gov/sites/default/files/publications/2019_chief_foia_officer_report_april_2019.pdf (last visited July 2, 2020). Moore’s requests have long surpassed the median and average number of days and are only a few weeks from the longest response time in 2018. This case is well outside CBP’s response time and represents one of the most delayed – if not the most delayed – requests faced by CBP from that time period.

such an order in the course of its management of this litigation. *See, e.g., Elec. Privacy Info. Ctr. v. DHS*, 218 F. Supp. 3d 27, 37 (D.D.C. 2016) (ordering DHS to produce 2,000 pages per month); *Nat'l Day Laborer Org. Network v. ICE*, 811 F. Supp. 2d 713, 731 (S.D.N.Y. 2011) (ordering ICE to fully respond to an outstanding FOIA request that required producing over 14,000 pages in one month); *ACLU v. DOD*, 339 F. Supp. 2d 501, 505 (S.D.N.Y. 2004) (ordering the agency to produce all responsive documents in one month); *Judicial Watch, Inc. v. Dep't of Energy*, 191 F. Supp. 2d 138, 140-41 (D.D.C. 2002) (ordering agencies to process over 6000 pages of material within 60 days); *NRDC v. Dep't of Energy*, 191 F. Supp. 2d 41, 43 (D.D.C. 2002) (ordering the production of 7500 pages to be completed within 60 days); *Detention Watch Network v. ICE*, Case No. 14 Civ. 583, ECF No. 48 (S.D.N.Y. July 3, 2014) (ordering DHS to either (a) review a minimum of 4,000 pages per month or (b) produce a minimum of 1,500 pages of responsive documents per month).

Indeed, district courts commonly use case management orders to resolve disputes between FOIA requesters and government agencies regarding the volume of pages the agency will produce each month. *See, e.g., ACLU of Southern Cal. v. DHS*, No. 2:17-cv-2778-RHW, ECF No. 61, Order Setting Production Schedule, (C.D. Cal. Dec. 13, 2017) (requiring the first 2,700 pages to be produced within less than a month, followed by 1,000 pages thereafter); *ACLU of San Diego & Imperial Counties v. DHS*, No. 3:17-cv-00733-L-JLB, ECF No. 53 (S.D. Cal. Nov. 6, 2017) (1,000 pp/mo); *ACLU of Wash. v. DHS*, No. 2:17-cv-00562-MJP, ECF No. 36 (Oct. 20, 2017) (setting a review requirement of 1,000 pages per month); *ACLU of Ill. v. DHS*, No. 1:17-cv-2768, ECF No. 73 (N.D. Ill. Nov. 28, 2017) (950pp/mo); *Mich. Immigrant Rights Ctr. v. DHS*, No. 2:16-cv-14192, ECF No. 52, Order Setting Production Schedule (E.D. Mich. Nov. 26, 2018) (requiring production of at least 3,356 pages per month).

Here, rather than engaging in consuming motion briefing to seek a preliminary injunction, Moore requests a reasonable and appropriate alternative – that the Court use its inherent power to order Defendants HHS and CBP to remedy their egregious heel-dragging. The Court has jurisdiction over these FOIA requests precisely because of Defendants’ delay going back two years. Despite the Court’s jurisdiction and this Court’s orders, Defendants HHS and CBP have decided to let their agencies – rather than this Court – dictate how production will proceed in this matter.

Moore requests the only remedy that will resolve this impasse. Specifically, Moore requests that the Court enter an order that: **(1) CBP identify and send to Plaintiff by August 15, 2020 the number of pages potentially responsive to CBP-2018-064544 and CBP-2019-010211; (2) all searches, review, and production of documents responsive to Moore’s June 22, 2018 request no. 19-F-0410 to HHS be completed no later than September 1, 2020; (3) all searches, review, and production of documents responsive to request no. CBP-2018-064544 be completed no later than October 1, 2020; and (4) all searches, review, and production of documents responsive to request no. CBP-2019-010211 be completed no later than October 1, 2020.**

As Congress explained in enacting FOIA, “information is often useful only if it is timely. Thus, excessive delay by the agency in its response is often tantamount to denial.” H. Rep. No. 876, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. Admin. News 6267 at 6271. Though Defendants are understandably facing challenges presented by the COVID-19 pandemic, they still have a responsibility to adhere to the law. Moreover, these requests have been in Defendants’ hands for over two years. “There is no evidence that they even attempted to conduct a reasonable search until, perhaps, they were under the gun as a result of this lawsuit. And even then, their

production of documents has proceeded at a pace that, if accepted, would defeat the purpose of the FOIA.” *Nat’l Immigrant Justice Ctr. v. U.S. Dep’t of Homeland Sec.*, No. 12 C 5358, 2015 WL 433580, at *8 (N.D. Feb. 1, 2015).

CBP and HHS have acted with unbridled discretion on these extremely delayed requests – something that has effectively denied Moore’s rights under the FOIA. For this reason, Moore requests that the Court: (1) lift the stay for Defendants to file their response to Plaintiff’s Motion for Judgment on the Pleadings; and (2) enter a new production schedule as listed herein.

Respectfully submitted,

THE LAW OFFICE OF LYNN COYLE, PLLC
2515 North Stanton Street
El Paso, Texas 79902
(915) 532-5544
Fax (915) 532-5566

/s/ Christopher Benoit
LYNN COYLE
Texas Bar No. 24050049
lynn@coylefirm.com
CHRISTOPHER BENOIT
Texas Bar No. 24068653
chris@coylefirm.com

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of July, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following CM/ECF participants: Manuel Romero, *Attorney for Defendants*.

/s/ Christopher Benoit
CHRISTOPHER BENOIT

CERTIFICATE OF CONFERENCE

I hereby certify that on the 8th day of July, 2020, I sent this Motion to attorney for Defendants, Manuel Romero. He indicated that Defendant CBP is opposed to the filing of this motion. He indicated that Defendant HHS is unable to respond at this time so it should be noted as being opposed to this motion.

/s/ Christopher Benoit
CHRISTOPHER BENOIT

EXHIBIT

A

June 29, 2019

Robert Moore
711 Blanchard Avenue
El Paso, TX 79902

Re: CBP-2019-010211

Dear Mr. Moore:

This is a fourth response to your Freedom of Information Act (FOIA) requests to U.S. Customs and Border Protection (CBP). You requested emails, text messages, memoranda and all other written communication regarding a Mobile Field Force Demonstration originally scheduled for November 6, 2018, in El Paso, Texas. A press release on the event described its location as "the railroad crossing west of the Paso Del Norte Port of Entry." The time period covered by your request was October 1, 2018, to November 11, 2018.

CBP FOIA has reviewed 651 pages of records for this release and has made the following determinations.

- 641 pages processed and determined to be non-responsive to the request
- 10 pages of records processed and determined to be partially releasable pursuant to Title 5 U.S.C. § 552 (b)(6), (B)(7)(C), and (B)(7)(E).

Additional information regarding the applicable exemptions and response can be found at the following link: <https://www.cbp.gov/document/guidance/exemption-definitions>.

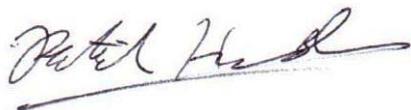
Copies of the FOIA and DHS regulations are available at www.dhs.gov/foia.

CBP FOIA continues reviewing the 8,358 documents previously identified as potentially responsive. The total page count for these 8,358 documents is unknown as each document must be individually examined to determine its page count. CBP FOIA is reviewing the instant FOIA request in balance with its other obligations in other FOIA litigation matters that predate the instant case.

In regards to plaintiffs other litigation, CBP's office which pulls e-mail has completed the pull for this litigation, but the CBP FOIA office currently lacks space on its shared drives to receive the records. CBP FOIA is currently exploring ways to receive this data while continuing to process records on CBP-2019-010211.

As this matter is currently in litigation, if you need further assistance or would like to discuss any aspect of this response, please contact Manuel Romero, Trial Attorney, Department of Justice, Civil Division, Federal Programs Branch.

Sincerely,

A handwritten signature in black ink, appearing to read "Patrick Howard", with a horizontal line underneath.

Patrick Howard
Branch Chief
U.S. Customs and Border Protection, FOIA Division
Privacy and Diversity Office

Enclosure(s)

EXHIBIT

B

From: Romero, Manuel (USATXW) <Manuel.Romero@usdoj.gov>
Sent: Friday, January 17, 2020 1:31 PM
To: Chris Benoit
Subject: Bob Moore
Attachments: c_Defendant's Unopposed Motion to Stay and Initial Status Report.docx; c_Joint Report on ADR.docx

Chris,

Her is my proposed motion to stay deadline which includes our production schedule. I also went ahead and drafted a joint ADR report which I believe is also due today.

Please note that as I was having each agency re-verify their ability to comply with the proposed schedule, one agency asked if we could change the date for the first production from March 20th to March 30th. They said they already have several other production schedules that require them to produce records on the 19th and 20th of each month. I told them I would ask for that change if they agreed to cut down the time of rolling production timeframe from 45 to 30 days. I told them since they already produce on a monthly basis in other cases, I made sense to me us to produce monthly in this case as well. All agencies agreed that only if absolutely needed, they would provide monthly production. Each of their goals however, particularly for HHS and ICE, is to have all searches completed and records released before our first production date.

Please let me know if this is agreeable. Please also advise to any comments on my draft motion or ADR report.

Manny Romero
Assistant United States Attorney
Western District of Texas – El Paso Division
700 E. San Antonio, Ste. 200
El Paso, Texas 79901
(915) 534-6555

EXHIBIT C



DEPARTMENT OF HEALTH & HUMAN SERVICES

ADMINISTRATION FOR CHILDREN AND FAMILIES

Mary E. Switzer Building
330 C ST, S.W.
Washington, D.C. 20201

Case No: 19-F-0410

January 8, 2020

Sent via email: bmooreep@gmail.com

Dear Mr. Moore:

This is a partial release to your Freedom of Information Act (FOIA) request for records any correspondence, including emails and text messages, regarding access to HHS databases, including those maintained by the ORR, by Department of Homeland Security officials. The names of the ORR officials for the search would be Scott Lloyd, Steven Wagner, Jallyn Sualog, Secretary Azar, James De la Cruz. You also requested a copy of Memorandum of Agreement (MOA) between HHS and DHS signed on April 13, 2018.

Your request was sent to the Office Refugee Resettlement. Enclosed is a seven page MOA. Information has been withheld pursuant to Exemption (b)(6). FOIA exemption (b)(6) permits the withholding of records which, if released, would constitute a clearly unwarranted invasion of personal privacy. In this case, the withheld information consists of a signature. Public disclosure of this information would constitute an invasion of privacy of those individuals whose identifying information was disclosed. In withholding the information, the individual's privacy interest was balanced against any public interest in disclosure. In each instance where information was withheld, it was determined that the individual's privacy interests outweighed any public interest in disclosure of the withheld information. Disclosure of the withheld information would invade the privacy of the subject individuals but would reveal nothing about the operations or activities of the government. Furthermore, release of the information could lead to potential identity fraud.

We will continue to produce records to you. If you are not satisfied with any aspect of the processing and handling of this request, you may contact the Assistant United States Attorney in the United States Department of Justice who is handling this case for the Department.

Sincerely yours,

Celeste Smith
Director
Office of Communications
Freedom of Information Office
Administration for Children and Families
Department of Health and Human Services

EXHIBIT

D



DEPARTMENT OF HEALTH & HUMAN SERVICES

ADMINISTRATION FOR CHILDREN AND FAMILIES

Mary E. Switzer Building
330 C ST, S.W.
Washington, D.C. 20201

Case No: 19-F-0410

April 6, 2020

Sent via email: bmooreep@gmail.com

Dear Mr. Moore:

This is a final response to your Freedom of Information Act (FOIA) request for records any correspondence, including emails and text messages, regarding access to HHS databases, including those maintained by the ORR, by Department of Homeland Security officials. The names of the ORR officials for the search would be Scott Lloyd, Steven Wagner, Jallyn Sualog, Secretary Azar, James De la Cruz. You also requested a copy of Memorandum of Agreement (MOA) between HHS and DHS signed on April 13, 2018.

The Office of Information Technology was asked to conduct a search for correspondence received from the email domain @dhs.gov and the following ACF employees:

- Scott Lloyd – (scott.lloyd@acf.hhs.gov)
- Steven Wagner – (steven.wagner@acf.hhs.gov)
- Jallyn Sualog – (Jallyn.sualog@acf.hhs.gov)
- James De la Cruz – (james.delacruz@acf.hhs.gov)
- Jonathan White – (jonathan.white@acf.hhs.gov)

They were also asked to search for the following terms within the custodians correspondence:

- HHS databases
- Access to HHS databases
- ORR databases

Their search results did not yield any records responsive to your request.

If you are not satisfied with any aspect of the processing and handling of this request, you may contact the Assistant United States Attorney in the United States Department of Justice who is handling this case for the Department.

Sincerely yours,

Celeste Smith
Director
Office of Communications
Freedom of Information Office
Administration for Children and Families
Department of Health and Human Services

EXHIBIT

E

From: Chris Benoit
Sent: Wednesday, May 13, 2020 3:51 PM
To: Romero, Manuel (USATXW); Lynn Coyle
Subject: FW: Moore v. ICE et al: For your review
Attachments: oei-BL-18-00510.pdf; HHS 18-F-0410 Moore response and clarification 9-25-2019.pdf

Manny,

I have had the chance to review HHS/ACF's final response to Mr. Moore and have consulted with a former HHS official regarding the request. There are serious gaps in the ACF's response so I wanted to give your client an opportunity to fix it.

As you know, Mr. Moore made a FOIA request almost two years ago seeking the memoranda of understanding or memoranda of agreement between any agency of DHHS and DHS from Jan. 2017 to June 2018. He also sought correspondence regarding access to HHS databases between ORR and DHS. He did not receive a substantive response for over a year.

In September 2019, after a query from Mr. Moore, the sub-agency of HHS – ACF – contacted Mr. Moore and asked for his clarification regarding the second part of his request.

He then clarified that he was seeking "emails" regarding "the creation of the MOU or MOA which news accounts have said allowed sharing of data involving unaccompanied children and their sponsors" [the MOU and/or MOA has already been produced so there should be no question about which MOU or MOA this refers to]. He sought emails "between HHS agencies and Department of Homeland Security agencies." See attached email, Sept. 25, 2019.

He then went on to say that his request should include (but is not necessarily limited to) certain communications between DHS to and from the acting assistant secretary of ACF or the director of ORR. Again, the date request did not change.

ACF responded on April 6 inexplicably limiting its request to emails received from DHS to five ACF employees. This is clearly far less than what was requested.

Also, despite the clear clarification by Mr. Moore seven months prior to search for all emails regarding the creation of the MOU or MOA, the agency limited its search to three unrelated search terms.

As you know, where an agency is aware that a requester seeks records relating to a particular subject, it is unreasonable for the agency to define the scope of the request to exclude those records. See, e.g., *Nat'l Sec. Counselors v. CIA*, 549 F. Supp. 2d 5, 12-14 (D.D.C. 2013). Agencies "need not get into a semantic debate over the meaning of [words in a request] to understand what the requester wanted." *Hemenway v. Hughes*, 601 F. Supp. 1002, 1005 (D.D.C. 1985). Rather, they must afford the requester as liberal a construction of the request as possible and define the request's scope accordingly. *Truitt*, 897 F.2d at 544-45. An "agency cannot withhold a record that is reasonably within the scope of the request on the grounds that the record has not been specifically named by the requester." *Lawyers' Cmte for Civ. Rts of San Francisco Bay Area v. U.S. Dep't of Treasury*, 534 F. Supp. 2d 1126, 1130-31 (N.D. Cal. 2008).

HHS has done exactly what they are not permitted to do. They have ignored clarifications that they sought and significantly narrowed their search. A simple review of public information shows that there was heavy communication regarding this MOA in early 2018. As an example, I've attached a report from the HHS OIG published in March of this year. I would direct you to page 17 describing the conversations between HHS and DHS and stating that ACF and ORR

were “heavily involved in finalizing an MOA. . .” It is implausible that such conversations were happening and Mr. Moore’s request would turn up no response.

We are requesting that HHS re-conduct a proper search for responsive records and promptly provide those documents to Mr. Moore. Given the extreme delay of this request, we are requesting that HHS finalize its search by June 5 to avoid court intervention.

I’m happy to discuss by phone, if you would like.

Christopher Benoit

**THE LAW OFFICE OF
LYNN COYLE
P.L.L.C.**

2515 North Stanton St.

El Paso, Texas 79902

Tel (915) 532-5544

Fax (915) 532-5566

chris@coylefirm.com

www.coylefirm.com

CONFIDENTIALITY NOTICE:

The contents of this e-mail are confidential to the sender and ordinary user of the e-mail address to which it was addressed, and may also be privileged. If you are not the addressee of this e-mail, you may not copy, forward, disclose or otherwise use it or any part of it in any form whatsoever. If you have received this e-mail in error, please advise the sender. Thank you.