IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER Plaintiff, v. THE UNITED STATES DEPARTMENT OF HOMELAND SECURITY Defendant.	No. 1:12-cv-00333-GK

PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION FOR ENTRY OF AN ORDER TO SHOW CAUSE WHY DEFENDANT SHOULD NOT BE HELD IN CONTEMPT

This motion concerns the extent to which a defendant can repeatedly disregard court imposed deadlines in a case that arises in the first instance from the failure to comply with a statutory deadline. After hearing the arguments of both parties in this Freedom of Information Act ("FOIA") lawsuit, the Court entered a Scheduling Order providing for the production of documents and a Vaughn index by August 24, 2012. Despite the fact that the Court's deadline for the production of documents was *later* than the date that the DHS represented it could produce documents, the agency waged a campaign of delay, waiting until the day of the production deadline to contact EPIC about narrowing the request, missing three court-ordered deadlines, and finally returning to the Court committed not to finally participating in the orderly and expeditious procession of the case but to delaying it for another 16 months. The last missed deadline was contained in the Court's September 5, 2012 Order staying the case until September 14, 2012, and directing that "this will be the FINAL Stay." Dkt. No. 16. The clear and unambiguous meaning of the September 5, 2012 Order was to put a "final" end to DHS's delays.

Because of DHS's refusal to abide by the Court's Scheduling Order, the agency's disregard of the September 5, 2012 Order, and *the agency's failure to produce any documents months after it said it could do so,* the Court should grant EPIC's cross-motion for DHS to show cause as to why the agency should not be held in contempt.

ARGUMENT

I. The Clear and Unambiguous Meaning of the September 5, 2012 Order was to Prevent DHS from Further Delaying this Case

The Court's September 5, 2012 Order states plainly, "this will be the FINAL Stay." Dkt. No. 16. An objective reading of the language and circumstances surrounding the Order reveals that its clear and unambiguous meaning was to put a "final" stop to DHS' delays rather than to serve as a prelude to a sixteen-month extension. *See Salazar ex rel. Salazar v. Dist. of Columbia*, 602 F.3d 431, 442 (D.C. Cir. 2010) (requiring that the underlying order be "clear and unambiguous"); *see also LaShawn A. ex rel. Moore v. Fenty*, 701 F. Supp. 2d 84, 90 (D.D.C. 2010) ("The order is to be interpreted using an objective test that considers the plain language of the order and the circumstances surrounding its issuance."). The Order supplied a date ("September 14, 2012") after which no more delays would be tolerated ("this will be the FINAL Stay"), and thus its language was facially plain. Courts in this Circuit have found orders with "facially plain" language to be clear and unambiguous.[1]

[1] *Compare Cobell v. Babbitt*, 37 F. Supp. 2d 6, 16 (D.D.C. 1999) (finding clear and unambiguous a "facially plain" order that "requires defendants to produce '[a]ll documents, records, and tangible things which embody, refer to, or relate to IIM accounts of the five named plaintiffs or their predecessors in interest.'") *and Int'l Painters & Allied Trades Indus. Pension Fund v. ZAK Architectural Metal & Glass LLC*, 736 F. Supp. 2d 35, 38-39 (D.D.C. 2010) (finding clear and unambiguous an order that directed the defendant to pay the plaintiffs $50,661.73 in monetary damages and to submit "all necessary records" to the plaintiffs) *with Athridge v. Aetna Cas. & Sur. Co.*, 184 F.R.D. 181, 198 (D.D.C. 1998) (order requiring defendant to convey certain causes of action to plaintiff was ambiguous as to whether conveyance prohibited defendant's lawyers from claiming attorney-client and work product privileges for documents related to those causes

The context surrounding the September 5, 2012 Order confirms that its meaning was to end rather than enable delays. The Order came at the end of a series of extravagant efforts by DHS to resist its obligations under the FOIA and the orders of this Court. By the time of the September 5, 2012 Order, DHS had missed the following deadlines: (1) the FOIA's August 23, 2011, deadline for a determination on EPIC's request and February 2, 2012 deadline for a determination on EPIC's administrative appeal; (2) DHS's own July 18, 2012, deadline to begin producing documents; (3) the Scheduling Order's August 24, 2012, deadline for a Vaughn index and the production of documents; and (4) the September 4, 2012, deadline created by the first Stay. Between the missed deadlines were other acts of defiance, such as the decision to wait until the day of the Scheduling Order's deadline to contact EPIC about narrowing the request, and the misrepresentation made to EPIC that narrowing the request as EPIC did would greatly facilitate the production of documents.

After these events, the Court entered its "final stay" on September 5, 2012, postponing the case until September 14, 2012. In claiming that the meaning of the Order was to allow the parties to assess the scope of the request, DHS relies heavily on the text of its own September 5, 2012, Motion to Stay. *See* Dkt. No. 6, at 6. But this view ignores the plain text of this Court's Order and the history of the case, which begins over one year ago with the decision to violate the deadlines established by FOIA, and includes missed deadlines, last-minute filings, and contradictory statements. Viewed in this context, the meaning of the Order becomes clear: to put a "final" stop to DHS's obstruction.

---

of action) *and Armstrong v. Executive Office of the President, Office of Admin.*, 1 F.3d 1274, 1289 (D.C. Cir. 1993) (order finding only that agency's current regulation was inadequate did not clearly and unambiguously require the promulgation of new regulations).

DHS asserts that EPIC's reading of the September 5, 2012 Order is "unreasonable and cannot be credited." Dkt. No. 21, at 7. But there is nothing "unreasonable" about expecting DHS to produce documents and a Vaughn index by September 14, 2012—a date that falls twenty days after the Court's original deadline, four months after the entry of the Scheduling Order, and almost 14 months after DHS first received EPIC's FOIA request.[2] Indeed, DHS itself apparently considered such a deadline reasonable until recently, as it told the Court that it would finish gathering documents by June 27, 2012, and would "make its first production by July 18, 2012." Joint Meet and Confer Statement, Dkt. No. 11 ¶ 6. It is far more unreasonable to suggest that the Order's meaning would allow the complete negation of the court's scheduling order. Under DHS's view, the Order prohibited a small delay while endorsing a much larger one.

Incredibly, DHS believes that it "has fully complied" with the Order because instead of seeking a delay of ten days, it seeks a delay of sixteen months. Just as "[m]oving to stay an order does not represent a good faith effort to comply with that order," moving for a far greater deviation from the Court's original deadline does not represent compliance with the Order. *See Am. Rivers v. U.S. Army Corps of Engineers*, 274 F. Supp. 2d 62, 68 (D.D.C. 2003).

[2] Conversely, DHS's two requests for ten-day stays of the scheduling order were unreasonable based on the ample time DHS had prior to the August 24, 2012 deadline to produce documents in order to engage in discussions on the scope of EPIC's FOIA Request. Despite DHS's charge that inter-agency conversations took place prior to EPIC's administrative appeal regarding the allegedly broad scope of EPIC's FOIA Request in January 2012, at no time did DHS request that EPIC narrow the scope of EPIC's FOIA Request prior to August 24, 2012. Decl. of James V.M.L. Holzer, I ("Holzer Decl."), attached to Dkt. No. 17 as Ex. 1 ¶ 13; Decl. of Amie Stepanovich ("Stepanovich Decl."), attached to Dkt. No. 18 as Ex. 1 ¶ 17. In fact, no communications between EPIC and DHS prior to August 24, 2012 related in any way to the scope of EPIC's FOIA Request. Stepanovich Decl. at ¶ 17. DHS further admits that it was not until the beginning of 2012, more than five months after EPIC's FOIA Request was submitted, that DHS even started its search for documents in response to EPIC's FOIA Request, and the Agency did not take steps to identify the components likely to have responsive records until the month EPIC filed its Complaint. Holzer Decl. ¶¶ 17-18.

II. Contempt is an Appropriate Remedy in this Case Because DHS's Delays have Threatened the "Orderly and Expeditious Disposition of this Case," and the Court Must "Prevent Abuses of the Judicial Process."

After missing three court-ordered deadlines, DHS has already caused substantial delay and waste, and the agency now seeks to compound this inefficiency by using the Court's September 5, 2012 Order as a vehicle for accomplishing further delay. Waste, delay, and disregard for court-ordered obligations are all harms that the contempt power was designed to alleviate. *See Cobell v. Babbitt*, 37 F. Supp. 2d 6, 14 (D.D.C. 1999) (noting, in finding defendants in civil contempt, that "courts have a duty to hold government officials responsible for their conduct when they infringe on the legitimate rights of others."); *Webb v. Dist. of Columbia*, 146 F.3d 964, 971 (D.C. Cir. 1998) (citing the "inherent power [of the court] to protect its integrity and prevent abuses of the judicial process.") (citations omitted); *N.L.R.B. v. Blevins Popcorn Co.*, 659 F.2d 1173, 1185 n.73 (D.C. Cir. 1981) (noting that the "principal purpose" of civil contempt is "vindication of judicial authority"); *Wood v. Georgia*, 370 U.S. 375, 383 (1962) ("We start with the premise that the right of courts to conduct their business in an untrammeled way lies at the foundation of our system of government and that courts necessarily must possess the means of punishing for contempt when conduct tends directly to prevent the discharge of their functions."); *Link v. Wabash R. Co.*, 370 U.S. 626, 630–31 (1962) (the contempt power is "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.").

In addition to increasing delay and waste, permitting DHS to ignore the Court's September 5, 2012 Order would incentivize similar misconduct in future cases. Federal agencies would learn that it does not matter how neglectful they are in processing requests, that they can

make representations to the Court about production that can be subsequently withdrawn, and that they can even wait until the final deadline of production to begin a discussion about the processing of the request. They would learn that scheduling orders *are*, in fact, "frivolous piece[s] of paper," *DAG Enterprises, Inc. v. Exxon Mobil Corp.*, 226 F.R.D. 95, 104 (D.D.C. 2005), that can be evaded initially through multiple stays before being cast aside entirely.

DHS's delays are particularly egregious in the context of a FOIA lawsuit, the whole point of which is to compel a decision that has been unlawfully withheld. DHS's actions demonstrate disregard not only for the administration of this case but for the purpose of the FOIA: "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." *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242, (1978). The agency would invert FOIA's purpose, turning a "general philosophy of full agency disclosure" into a philosophy of secrecy. *Fed. Open Mkt. Comm. of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 351-52 (1979).

CONCLUSION

DHS's refusal to honor court-ordered deadlines has wasted judicial resources, undermined the purpose of the FOIA, and threatened the orderly and expeditious disposition of this case. For the above reasons and those discussed in its opening motion, this Court should order the agency to show cause as to why it should not be held in contempt for its failure to comply with this Court's September 5, 2012 Order.

Respectfully submitted,

October 5, 2012
DATE

/s/ Marc Rotenberg
MARC ROTENBERG
GINGER McCALL

AMIE STEPANOVICH*
Electronic Privacy Information Center
1718 Connecticut Ave., NW
Suite 200
Washington, D.C. 20009
(202) 483-1140
Counsel for Plaintiff

* Amie Stepanovich is barred in New York State. Her application for admission in the District of Columbia is pending.