UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER, Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	)	Civil Action No. 18-1814 (TNM)

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant, United States Department of Justice, by its undersigned attorneys, respectfully moves the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for an order granting summary judgment in favor of defendant on the grounds that no genuine issue as to any material fact exists and defendant is entitled to judgment as a matter of law. In support of this motion, the Court is respectfully referred to defendant's accompanying declarations, the Statement of Material Facts As To Which There Is No Genuine Issue, and the Memorandum of Points and Authorities in Support of Defendant's Motion For Summary Judgment. A proposed order is also attached.

Respectfully submitted,

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ELECTRONIC PRIVACY INFORMATION CENTER,	)	
Plaintiff,	)	
v.	)	Civil Action No. 18-1814 (TNM)
UNITED STATES DEPARTMENT OF JUSTICE,	)	
Defendant.	)	

DEFENDANT'S STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO GENUINE ISSUE

Pursuant to Local Rule 7(h), defendant United States Department of Justice, on behalf of the Executive Office for United States Attorneys ("EOUSA"), submits this statement of material facts as to which there is no genuine issue:

1. By letters dated June 14, 2017, June 21, 2017, and July 2, 2019, plaintiff sought the first page of all orders for cell phone site locations issued pursuant to 18 U.S.C. § 2703(d), for the years 2016, 2017, 2018 and 2019. Declaration of John W. Kornmeier ("Kornmeier Decl."), attached, ¶ 4.

2. On August 1, 2018, plaintiff filed suit. ECF No. 1.

3. By letter dated October 10, 2018, EOUSA informed plaintiff that EOUSA does not track the information requested. Kornmeier Decl., ¶ 5.

4. EOUSA's CASEVIEW database tracks cases for 94 U.S. Attorney's Offices ("USAO"). Id. at ¶ 6.

5. EOUSA attempted to search CASEVIEW for responsive records and found that CASEVIEW does not track the information sought by plaintiff. Id. at ¶ 7.

6. At plaintiff's request, EOUSA contacted the two largest USAOs – the USAO for the District of Columbia ("USAO-DC"), and the USAO for the Southern District of New York ("USAO-SDNY") – and asked those offices to undertake a search for responsive records. Id. at ¶ 8.

7. Both offices reported that any such search would involve extensive laborious work. Id.

8. The USAO-DC has determined that the requested search would be unduly burdensome and, even if performed to the extent capably by the office, it would be incomplete. Declaration of T. Patrick Martin ("Martin Decl."), attached, ¶¶ 3-5.

9. The USAO-SDNY has determined that the requested search would be unduly burdensome, and even if performed to the extent capably by the office, it would be incomplete. Declaration of John M. McEnany ("McEnany Decl."), attached, ¶¶ 3-7.

10. Plaintiff also asked EOUSA to have the USAO for the Eastern District of Oklahoma ("USAO-OKE"), the USAO for the Eastern District of Pennsylvania ("USAO-EDPA") and the USAO for the Southern District of California ("USAO-SDCA") perform searches for responsive records. Kornmeier Decl., ¶ 9.

11. EOUSA agreed to ask those offices undertake a search. Id. at ¶ 10.

12. USAO-OKE reported that they do not track Section 2703(d) orders or maintain a log of such orders and thus they would have to manually search all their case files for the designated time period. Id. at ¶ 11.

13. USAO-SDCA reported that they do not track Section 2703(d) orders or maintain a

log of such orders and thus they would have to manually search all their case files for the designated time period. Id.

14. USAO-EDPA reported that they do not track this information by any means. Id.

15. The USAO-OKE has determined that the requested search would be unduly burdensome, and even if performed to the extent capably by the office, it would be incomplete. Declaration of Christopher J. Wilson ("Wilson Decl."), attached, ¶¶ 4-10.

16. The USAO-SDCA has determined that the requested search would be unduly burdensome, and even if performed to the extent capably by the office, it would be incomplete. Declaration of David Leshner ("Leshner Decl."), attached, ¶¶ 4-8.

17. The USAO-EDPA has determined that the requested search would be unduly burdensome, and even if performed to the extent capably by the office, it would be incomplete. Declaration of Thomas R. Perricone ("Perricone Decl."), attached, ¶¶ 3-6.

18. A survey of 94 U.S. Attorney's Offices revealed that a search for information responsive to plaintiff's FOIA requests would be unduly burdensome. Kornmeier Decl., ¶¶ 14-15.

19. The vast majority of Section 2703(d) Orders are sealed by the courts and thus would be unavailable for release to plaintiff. Martin Decl., ¶ 6; Fleshner Decl., ¶ 9; Wilson, ¶ 11; McEnany Decl. ¶ 8, Perricone Decl., ¶ 7.

20. EOUSA has no policy, practice or pattern of failing to search for reasonably described FOIA requests submitted by plaintiff. Kornmeier Decl., ¶ 16.

21. EOUSA has no policy, practice or pattern of failing to meet FOIA deadlines as construed by the statute and the courts. Kornmeier Decl., ¶ 17.

22. EOUSA has issued a final decision on plaintiff's FOIA requests and there is nothing left to expedite. See Kornmeier Decl., ¶¶ 5-15.

Respectfully submitted,

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Chief, Civil Division

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGEMENT

PRELIMINARY STATEMENT

Plaintiff filed this civil action against the United States Department of Justice ("DOJ"), alleging that DOJ violated the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, in connection with plaintiff's three requests for certain specified information. In particular, plaintiff requested from DOJ's Executive Office of U.S. Attorneys ("EOUSA") the first page of all orders for cell phone site locations issued pursuant to 18 U.S.C. § 2703(d), for the years 2016, 2017, 2018 and 2019. EOUSA checked its database that tracks cases for all 94 U.S. Attorney's Offices and discovered that the database does not track Section 2703(d) orders. In an effort to try and determine whether a search for these orders could be done by the individual U.S. Attorney's Offices, EOUSA and plaintiff agreed that certain U.S. Attorney's Offices would be contacted to ascertain those offices' ability to undertake a search for these orders.

Five different U.S. Attorney's Offices, of different sizes, reported that they do not track these orders. They also reported that to undertake a full search for these orders would be unduly burdensome, or in some cases, impossible. Plaintiff expressed no interest in having EOUSA perform any limited searches, which would have underreported the number of such orders.

Accordingly, because EOUSA in fact performed multiple searches for responsive information, and concluded that to undertake the full searches plaintiff seeks would be unduly burdensome, and in some cases impossible, defendant is entitled to summary judgment on Count III of the First Amended Complaint, which alleges that defendant has unlawfully withheld agency records, and Count IV, which alleges that EOUSA has a policy, pattern and practice of failing to conduct a search in response to plaintiff's reasonably described FOIA requests. Additionally, given that this dispositive motion sets forth defendant's final position on plaintiff's FOIA requests at issue in this case, plaintiff's claims in Count I and Count II, that defendant has failed to make a final decision on plaintiff's requests, and failed to grant plaintiff's requests for expedited processing, should be dismissed as moot.

Finally, in Count V, plaintiff alleges that EOUSA has a policy and practice of failing to comply with FOIA's statutory deadlines. This claim, however, ignores the fact that FOIA deadlines may be properly extended when an agency is diligently working to respond to the FOIA requests before it. Plaintiff can point to no evidence that EOUSA is failing to comply with FOIA's deadlines as extended.[1]

Accordingly, as demonstrated in the accompanying declarations, and as set forth below,

[1] Count VI of the Complaint is simply a request for relief, as opposed to a claim of any violation by defendant.

defendant is entitled to summary judgment.

ARGUMENT

I. EOUSA has no Policy, Pattern or Practice of Failing to Conduct a Search in Response to Reasonably described FOIA Requests

In Count IV of the First Amended Complaint plaintiff alleges that EOUSA has a policy, pattern and practice of refusing to conduct a search for records in response to plaintiff's reasonably described requests. The facts of this case show otherwise.

As the accompanying Declaration of John W. Kornmeier ("Kornmeier Decl.") states, EOUSA manages and administers a database called CASEVIEW, which tracks cases for all 94 of the U.S. Attorneys Offices ("USAO"). Id. at ¶ 6. Upon receipt of plaintiff's first request for Section 2703(d) orders, EOUSA checked with the Data Analysis Staff that manages this database and determined that CASEVIEW does not track these orders. Id. at ¶ 7.

EOUSA then engaged with plaintiff's counsel to discuss whether there were other possible ways to search for the requested information. At plaintiff's request, EOUSA contacted the two largest USAOs, which are the U.S. Attorney's Office for the Southern District of New York ("USAO-SDNY") and the U.S. Attorney's Office for the District of Columbia ("USAO-DC"). Id. at ¶ 8. As Mr. Kornmeier explains:

> These two districts informed us that they could not retrieve the information without extensive laborious work by the Criminal AUSAs going through their hard copy and electronic files. EPIC was informed, however, that limited searches could be performed. For example, on February 7, 2019, counsel for defendant informed EPIC's counsel that the USAO-SDNY had a Criminal Clerk's Log that for 2016, the time period EPIC asked that office to search, contained 39 items that contained the term "cell site." Along with other information, EPIC was also informed of the effort that would be required to do a manual search for 2703(d) orders. EPIC was expressly asked how it wanted to proceed. EPIC responded that it needed time to consider its next steps.

Id. at ¶ 8.

Plaintiff did not ask USAO-SDNY to undertake any limited searches. Instead, plaintiff asked EOUSA to undertake additional searches at the U.S. Attorney's Office for the Eastern District of Pennsylvania ("USAO-EDPA"), the U.S. Attorney's Office for the Eastern District of Oklahoma ("USAO-OKE"), and the U.S. Attorney's Office for the Southern District of California ("USAO-SDCA"). Kornmeier Decl., ¶ 9. The searches were undertaken and plaintiff was informed that none of the offices track information pertaining to Section 2703(d) orders or maintain a log of such orders. The only way to find responsive information would be to manually search all of their case files. Id. at ¶¶ 10-11. After receiving this information, plaintiff responded that "'[w]e need some additional time to review and confirm whether there are any remaining issues in dispute.'" Id. at ¶ 11. Plaintiff then decided to move to amend its complaint. Id. at ¶ 12.

The foregoing demonstrates that, contrary to plaintiff's claim, EOUSA did perform multiple searches for responsive information. EOUSA checked its main database and, at plaintiff's request, had searches undertaken at USAOs that plaintiff identified. There was no refusal to undertake searches requested by plaintiff. Id. at ¶ 16. Plaintiff apparently was not interested in anything less than a full search in each U.S. Attorney's Office for responsive information. As explained below, such full searches cannot be reasonably undertaken. See, infra at 5-12.

Thus, the Kornmeier Declaration amply demonstrates that EOUSA has no policy, pattern or practice of refusing to undertake searches in response to a reasonably described FOIA request. Defendant is entitled to summary judgment on Count IV of the Complaint.

II. EOUSA is Not Obligated to Perform an Unduly Burdensome Search

In Count II of the First Amended Complaint plaintiff alleges that EOUSA has wrongfully withheld agency records requested by plaintiff. On the contrary, EOUSA determined that the search of 94 USAOs sought by plaintiff was unduly burdensome and thus not required by the FOIA.

In responding to a FOIA request, an agency is under a duty to conduct a **reasonable** search for responsive records. Oglesby v. Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990). The FOIA was enacted to shed light on the activities of the federal government, but it was not intended to "reduce government agencies to full-time investigators on behalf of requesters." Assassination Archives & Research Ctr., Inc. v. CIA, 720 F. Supp. 217, 219 (D.D.C.1989). Nor was it meant to reduce a federal agency to a collection of full-time document reviewers. Am. Fed. of Gov't Empl. ("AFGE") v. U.S. Dep't of Commerce, 907 F.2d 203, 208- 09 (D.C. Cir. 1990) (concluding that the agency need not comply with a FOIA request that would "require the agency to locate, review, redact, and arrange for inspection a vast quantity of material"). Accordingly, the D.C. Circuit has held that agencies need not comply with FOIA search requests that would impose an unreasonable burden on the agency. Id. at 209.

"An agency need not honor a request that requires an unreasonably burdensome search." AFGE, 907 F.2d at 209. The term "search" in the preceding quotation encompasses more than just the act of locating records. As the AFGE Court explained, the "search" in that case was unreasonable because it would "require the agency to locate, *review, redact, and arrange for inspection* a vast quantity of material." Id. (emphasis added).

In AFGE the Court held that a FOIA request was unreasonably burdensome because it

sought inspection of literally "every chronological office file and correspondent file, internal and external, for every branch office, staff office, assistant division chief office, division chief office, assistant director's office, deputy director's office, and director's office" of the Census Bureau. Id., 907 F.2d at 205, 208–09. Similarly, in Hainey v. U.S. Dep't of Interior, 925 F. Supp.2d 34 (D.D.C. 2013), the FOIA request found to be unduly burdensome would have required a search of "every email sent or received by 25 different employees" just to locate responsive material, as well as an "individual[ ] review of each potentially responsive email to confirm its releasability". Id, at 45.

In other words, burden is burden, and an agency need not comply with an unreasonable request regardless of whether the majority of the burden falls at the front end, with the location of the documents, or at the back end, with the review, redaction, or referral of the records. See, e.g., Nation Magazine v. U.S. Customs Serv., 71 F.3d 885, 892 (D.C. Cir. 1995) (agreeing that search that would require review of twenty-three years of unindexed files would be unreasonably burdensome); Wolf v. CIA, 569 F. Supp.2d 1, 9 (D.D.C. 2008) (holding that search of microfilm files requiring frame-by-frame reel review that would take estimated 3675 hours and $147,000 constitutes unreasonably burdensome search); Schrecker v. Dep't of Justice, 217 F. Supp.2d 29, 35 (D.D.C. 2002).

A court will rely on a declaration from the agency for an explanation of why a search would be unduly burdensome, unless the declaration is vague or controverted by other record evidence. People for the American Way Foundation v. U.S. Dep't of Justice, 451 F. Supp.2d 6, 12-13 (D.D.C. 2006). The declarations supporting this motion amply demonstrate that the search requested by plaintiff would be unduly burdensome.

As the accompanying Declaration of T. Patrick Martin ("Martin Decl.") states, the USAO-DC has no tracking or central filing system for Section 2703(d) orders. Id. at ¶ 3. Approximately 238 Assistant U.S. Attorneys ("AUSA") in two separate divisions seek and obtain Section 2703(d) orders in connection with criminal investigations and only some of them enter these orders into an electronic log. Id. Therefore, a search of the electronic log would be underinclusive. Id.

In order to do a manual search for all Section 2703(d) orders, USAO-DC would first have to identify all criminal cases handled during 2016, 2017, 2018 and 2019. In the Criminal Division, from 2016 through June 22, 2018, there were 4,643 cases handled by the division. Id. at ¶ 4. In the Superior Court Division, there were more than 60,000 cases or criminal matters handled for 2016, 2017 and 2018. Id. In order to search these cases, the USAO-DC would have to locate each case file, which could range in size from a case jacket to dozens of boxes, and physically search all the contents looking for any Section 2703(d) orders. Id. This would take "many hundreds person hours." Id.

No electronic search could be undertaken of the USAO-DC network files, which currently contains approximately 500 TB of data. Any effort to conduct such a search would render the office's system largely unusable for ordinary business. This is simply not a search that the USAO-DC IT Services can conduct, given the office's current system and file configuration. Id. at ¶ 5.

Moreover, even if such a search could be conducted, it would not capture all the Section 2703(d) orders. Although copies of some signed orders are scanned in and saved electronically by some AUSAs, this is not a uniform practice and thus a complete search would still require a

manual search of all criminal case files for the relevant period. Id.

The USAO-SDNY found similar issues with respect to its search. As the accompanying Declaration of John M. McEnany ("McEnany Decl.") explains, the USAO-SDNY has no central tracking system for Section 2703(d) orders. Id. at ¶ 4. The Manhattan Office of the USAO-SDNY has a Criminal Clerks log that identifies documents that the Criminal Clerks deliver to Court but it does not contain the actual documents. Id. at ¶ 3. Although it can be used to try and identify cases in which Section 2703(d) orders were issued, it is incomplete, because it is a common practice for AUSAs and paralegals in that office to take orders to court without going through the Criminal Clerks. And the White Plains, New York branch of the USAO-SDNY does not maintain such a log. Id. at ¶¶ 3-4.

To try and identify the location of Section 2703(d) orders not identified in the Criminal Clerks log, a search of all criminal cases and matters open during the relevant time period would have to be undertaken, which consists of approximately 10,178 for the period of 2016-2019. Id. at ¶ 5. Additionally, the USAO-SDNY creates approximately 1800 cloud-based network files each year, resulting in approximately 7,200 such files. Id.

A search of the USAO-SDNY digital files is completely unfeasible. The office has no automatic search capability to conduct a search for Section 2703(d) orders because they are not kept in any document management system that indexes documents as they are created or allows for easy key-word or advanced searches. Id. at ¶ 6(a). The office has approximately 200 TB of data stored in the "cloud" and any attempt to search that data would render the office's system unusable for ordinary business purposes. Id. at ¶¶ 6(a) & (b).

A search of AUSA network files could not be conducted during the day because of the

disruption to ordinary business. It would take approximately two-three hours to search the network files of each of the current 135 AUSAs, which would take approximately a year and affect the office's IT Service's personnel's ability to provide after-hours availability for office-related matters. Id. at ¶ 6(c).

The USAO-SDNY creates approximately 3,000 case files each year, resulting in approximately 12,000 for the four-year period in question. Searching these files once located and retrieved could take approximately six months if the search were continuous, which it could not be or other records and FOIA activity would be brought to a standstill. Id. at ¶ 7.

The USAO-EDPA also has no tracking or central filing system that tracks Section 2703(d) orders, either in paper form or electronically. Declaration of Thomas R. Perricone ("Perricone Decl."), ¶ 3. Although some AUSAs, beginning in 2017, becgan to enter Section 2703(d) orders into CaseView, the practice was not uniform and therefore not all such orders handled by that office are contained in this system. Id.

With respect to physical files, the USAO-EDPA had approximately 3,000 cases open each year between 2016 and October 25, 2018. Even though there was significant overlap between the years, the cases comprise 8,800 cubic square feet of files. To physically search these files for Section 2703(d) orders would take "hundreds of person hours." Id. at ¶ 4.

The USAO-EDPA's network files are not kept in a system that indexes documents as they are created and does not allow for easy key-word or advanced searches. The office has approximately 50 TB of data. As Mr. Perricone explains:

> [A]ny effort by USAO-EDPA IT Services to access and index that content data would render the system largely unusable for ordinary business purposes and, quite possibly, simply crash the system. A system crash could cause a corruption of data, resulting in crucial work product becoming unusable and/or unrecoverable. Even

> without the risk of a crash – the system resources required to run such a search would greatly stress the system for days, disrupting normal daily activity for over 300 employees for the duration of search (sluggish network response time, inability to read/wrote network files, etc.).

Perricone Decl., ¶ 5.

The same potential for a crash would occur with any effort to access just file names or to do a filename search. Id. at ¶ 6. "This is not a search that USAO-EDPA IT Services could run with our current system and file configuration." Id. And even if it could be conducted, it would not identify all Section 2703(d) orders because most AUSAs do not scan and electronically save a copy of the signed order. Id.

The USAO-SDCA also does not centrally track or file Section 2703(d) orders. Declaration of David Leshner ('Leshner Decl."), ¶ 5. Although AUSAs in the USAO-SDCA ordinarily keep a copy of Section 2703(d) orders both in the physical files and in a network file, id. at ¶ 4, the search problems for both of these systems are similar to those found in the other offices.

The USAO-SDCA has approximately 23,244 cases/investigations for 2016, 2017 and 2018. A manual review of these files would take approximately 1,937 hours. Consequently, "conducting manual searches of physical case files for § 2703(d) orders would place a virtually insurmountable burden on the USAO-SDCA." Id. at ¶ 6.

With respect to electronic files, the USAO-SDCA files, like those in the other offices, are not kept in a system that indexes documents as they are created and does not allow for easy key-word or advanced searches. Id. at ¶ 8. The files are stored in a "cloud" which has approximately 111 TB of data, which includes over 190 million files. Mr. Leshner explains that:

> Searching for electronic files containing § 2703(d) orders across the computer

> network is not feasible because it will crash the system doing the search. Any effort to access even just the file names to do a filename search would also crash. Even if a file search were limited to files created during a single year, the properties of all files would still have to be read to determine which were created in that year. This is not a search that USAO-SDCA IT Services could run with our current system and file configuration

Id.

Lastly, the USAO-OKE maintains no log or database of applications for section 2703(d) orders. Declaration of Christopher Wilson ("Wilson Decl."), ¶ 4. A paper copy of such orders should exist in the case file as well as on the USAO-OKE network. Id.

The USAO-OKE electronic case files are maintained on the office's network with respect to open files and in the "cloud" with respect to closed files. Because the files in neither location are indexed by year, any search for responsive records would have to include the entire network and the entire "cloud." The USAO-OKE has approximately 952,200 files, consisting of approximately 1 TB of data. Id. at ¶ 5.

The USAO-OKE has software to help search shared criminal folders and files stored in the "cloud", but it cannot search the individual electronic folders of each AUSA or legal assistant. Id. at ¶ 6. In order to ensure that a search was complete, a manual search of all case files would have to be performed. From 2016 to the present, USAO-OKE opened 654 case files. Id. at ¶ 9. A search of these files would take approximately 190 hours to complete. Id. at ¶ 12. "Dedicating this number of hours would subject the USAOKE to a greater hardship because of our limited manpower and resources." Id.

The foregoing declarations represent the results from only five of 94 USAOs. They cannot be looked at as if each USAO consists of a separate agency. They are all part of one agency – defendant DOJ - that plaintiff has sought to have undertake a search for responsive

records. For purposes of FOIA, they should be considered offices within an agency. Thus, the results from these five USAOs shows the burdens of only a fraction of the burden that the entire agency would assume, if plaintiff's demand for the search sought is granted.

Indeed, as Mr. Kornmeier states:

> I contacted the other 94 USAOs to determine whether retrieval of the requested information would be unreasonably burdensome. These districts confirmed that retrieval would be unreasonably burdensome, with the exceptions of Rhode Island and the Virgin Islands, which noted a search might not be unreasonably burdensome because of the small numbers, at least for AUSAs who are still there. Given that EPIC had expressed no interest in partial searches, I did not pursue this.

Kornmeier Decl., ¶ 14. Thus, Mr. Kornmeier's survey demonstrated that EOUSA would not be able to respond to the comprehensive requests for all cell site orders for the 94 USAOs for 2016, 2017, 2018, and 2019. Id. at ¶ 15.

The difficulties and burdens associated with the searches plaintiff seeks places them squarely in the realm of the FOIA requests that courts have deemed too burdensome to merit a response. In other words, as these requests, would "require the agency to locate, review, redact, and arrange for inspection a vast quantity of material," the agency need "not honor" them. AFGE, 907 F.2d at 209.

"It is the agency's burden . . . to 'provide sufficient explanation as to why [responding to a FOIA request] would be unreasonably burdensome." Pinson v. U.S. Dep't of Justice, 80 F. Supp. 3d 211, 216 (D.D.C. 2015) (*quoting* Nation Magazine, Washington Bureau v. U.S. Customs Serv., 71 F.3d 885, 890 (D.C. Cir. 1995)). EOUSA has amply carried that burden here.

Finally, and significantly, Section 2703(d) orders are sealed and only a small number

of them have been unsealed by courts. Martin Decl., ¶ 6; Fleshner Decl., ¶ 9; Wilson, ¶ 11; McEnany Decl. ¶ 8, Perricone Decl., ¶ 7. In fact, unsealing orders are rarely obtained. McEnany Decl. ¶ 8, Perricone Decl., ¶ 7. Thus, plaintiff's requests would impose an undue burden on defendant for virtually no return to plaintiff, as most of the records plaintiff seeks are under seal and thus could not be released.

Summary judgment should be granted to defendant with respect to Count II.

III. EOUSA Dos Not Engage in a Pattern and Practice of Violating the FOIA

In Count V plaintiff alleges that EOUSA has a policy, pattern and practice of failing to comply with FOIA's statutory deadlines with respect to plaintiff's FOIA requests. Plaintiff's claims are without merit.

An agency receiving a FOIA request generally must determine whether to comply with the request within 20 working days. 5 U.S.C. § 552(a)(6)(A)(i). Once the initial twenty days has passed without an agency determination on the request, the FOIA requester "shall be deemed to have exhausted his administrative remedies," Id. at § 552(a)(6)(C)(I), and the requestor can file suit in federal court. The Court may, however, "allow the agency additional time to complete its review of the records" upon a showing that "exceptional circumstances exist and that the agency is exercising due diligence in responding to the request." Id. § 552(a)(6)(C)(i).

Effective October 2, 1997, as part of the Electronic Freedom of Information Act Amendments of 1996, Congress amended 5 U.S.C. § 552(a)(6)(C)(i) by adding the following two subsections:

> (ii) For purposes of this subparagraph [5 U.S.C. § 552(a)(6)(C)], the term"exceptional circumstances" does not include a delay that results from a predictable agency workload of requests under this section, unless the agency

> demonstrates reasonable progress in reducing its backlog of pending requests.
>
> (iii) Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing the request (or a modified request) under clause (ii) after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this subparagraph.
>
> See 5 U.S.C. § 552(a)(6)(C)(ii), (iii).

The leading case construing section 552(a)(6)(C) is Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976), which involved the issue of an agency's backlog of FOIA requests preventing it from even starting to work on the plaintiff's FOIA request. In that case, which involved a FOIA request directed to the FBI, the Court of Appeals for this Circuit held that an agency is entitled to additional time to process a FOIA request under § 552(a)(6)(C) when it is deluged with a volume of requests for information vastly in excess of that anticipated by Congress, when the existing resources are inadequate to deal with the volume of such requests within the time limits of subsection (6)(A), and when the agency can show that it "is exercising due diligence" in processing the requests. Id. at 616 (*quoting* 5 U.S.C. § 552(a)(6)(C)). See also Oglesby v. Department of the Army, 920 F.2d 57, 64 (D.C. Cir. 1990) ("Frequently, if the agency is working diligently, but exceptional circumstances have prevented it from responding on time, the court will refrain from ruling on the request itself and allow the agency to complete its determination.").

The importance of the Open America decision is that the Court of Appeals recognized that there may be circumstances in which an agency simply cannot reasonably process a FOIA request within the statutory timetables. Under such circumstances, if the agency is exercising due diligence in its efforts, a stay of proceedings is warranted to allow the agency the time

needed to process the FOIA request. Courts "cannot focus on theoretical goals alone, and completely ignore the reality that these agencies cannot possibly respond to the overwhelming number of requests received within the time constraints imposed by FOIA." Cohen v. FBI, 831 F. Supp. 850, 854 (S.D. Fla. 1993).

"[E]xceptional circumstances" therefore include "any delays encountered in responding to a request as long as the agencies are making good-faith efforts and exercising due diligence in processing requests . . . ." Appleton v. FDA, 254 F. Supp.2d 6, 8-9 (D.D.C. 2003). Courts have frequently issued orders extending the time to respond to FOIA requests. See e.g., National Security Archive v. SEC, 770 F. Supp.2d 6, 8-9 (D.D.C. 2011); Electronic Frontier Foundation v. Department of Justice, 517 F. Supp.2d 111, 120-121 (D.D.C. 2007); Piper v. U.S. Department of Justice, 339 F. Supp.2d 13, 16 (D.D.C. 2004) (discussing a stay of two years given to the FBI); Appleton, 254 F. Supp.2d at 11 (granting FDA's motion for stay pending completion of search and production of documents); Williams v. FBI, 2000 WL 1763680, at *3 (giving the FBI until May 2, 2001, to review records requested prior to August 21, 1998); Judicial Watch of Florida, Inc. v. U.S. Department of Justice, 102 F. Supp.2d 6, 9 & n.1 (D.D.C. 2000) (discussing an order giving the FBI until June 8, 2000, to respond to a request dated July 15, 1997); Edmond v. United States Attorney, 959 F. Supp. 1, 4 (D.D.C. 1997) (giving the U.S. Attorney's Office until April 1, 1998 to respond to a request filed August 14, 1992); Rabin v. U.S. Department of State, 980 F. Supp. 116, 123-24 (E.D.N.Y. 1997) (permitting Department of State over three years to process plaintiff's FOIA request); Jiminez v. FBI, 938 F. Supp. 21, 31 (D.D.C. 1996) (granting FBI's request for stay and permitting it over four years to respond to plaintiff's FOIA request); Ohaegbu v. FBI, 936 F. Supp. 7, 8-9 (D.D.C. 1996) (granting request for stay and permitting July

1997 response to FOIA request submitted in July 1995).

The Kornmeier Declaration explains that EOUSA receives between four and five thousand FOIA requests a year, and has 178 cases in litigation. Id. at ¶ 17. EOUSA only has eleven attorneys and nine information specialists to handle this load. Id. Cases such as the instant one, with repeated attempts at conferring with plaintiff's counsel, and the running multiple searches, are an obvious example of how time-consuming some of these requests can be.

Because the FOIA specifically provides for extensions of its statutory deadlines, plaintiff cannot show that there is any policy, pattern or practice of failing to comply with FOIA's deadlines with respect to plaintiff's requests.

IV. Counts I and II are Moot and Should be Dismissed

In Count I plaintiff claims that EOUSA has failed to make a final determination as to its FOIA requests. In Count II plaintiff claims that defendant failed to grant plaintiff expedited processing. Both of these claims are now moot. EOUSA has made clear that it cannot undertake a search for responsive records because it would be unduly burdensome. Given that decision, there is no action left to expedite.

When "events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future," a case becomes moot, and the courts no longer have jurisdiction over the matter. American Bar Ass'n v. FTC, 636 F.3d 641, 645 (D.C. Cir. 2011) (*citing* Clarke v. United States, 915 F.2d 699, 700-01 (D.C. Cir. 1990) (en banc) (quotation marks omitted)); see also Preiser v. Newkirk, 422 U.S. 395, 401 (1975). The fact that a case may present a live controversy when filed does not alter the current

mootness of Counts I and II. For courts to have jurisdiction over a matter under Article III of the U.S. Constitution, "'an actual controversy must exist not only at the time the complaint is filed, but through all stages of the litigation.'" Kingdomware Technologies, Inc. v. United States, 136 S. Ct. 1969, 1976 (2016) (*quoting* Already, LLC v. Nike, 133 S. Ct. 721, 726 (2013)); Arizonans for Official English v. Arizona, 520 U.S. 43, 67 (1997); Preiser v. Newkirk, 422 U.S. at 401.

No current controversy still exists with respect to Counts I and II. Consequently, they are moot and should be dismissed.

CONCLUSION

Accordingly, for all of the reasons set forth above, and in the accompanying declarations, defendant respectfully submits that this motion for summary judgment should be granted.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER, Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	)	Civil Action No. 18-1814 (TNM)

ORDER

Upon consideration of defendant's motion for summary judgment, plaintiff's opposition, and the entire record in this case, the Court finds that there are no issues of material fact and the defendant is entitled to judgment as a matter of law. Therefore, it is hereby

ORDERED that defendant's motion for summary judgment is granted.

This is a final, appealable order.

_____
UNITED STATES DISTRICT JUDGE