

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

)	
Matthew O'Brien,)	
6677 Debra Lu Way)	
Springfield, VA 22150)	
Plaintiff,)	Case No.: 1:24-cv-250
)	
v.)	
)	
Merrick Garland, Attorney General,)	
U.S. Department of Justice,)	
950 Pennsylvania Avenue, NW)	
Washington, DC 20530)	
)	
Defendant.)	
)	

COMPLAINT

Plaintiff Matthew O'Brien, by and through undersigned counsel, alleges the following violations of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, *et seq.*, as amended, and Privacy Act, 5 U.S.C. § 552a, *et seq.*, as amended:

NATURE OF ACTION

1. This is an action under the FOIA, 5 U.S.C. § 552, as amended, challenging the failure of the Department of Justice ("Agency" or "Defendant") to fulfill the request filed on behalf of the Plaintiff for records relating to Plaintiff's period of employment for Defendant.
2. This case seeks declaratory relief that the Defendant is in violation of FOIA for failing to respond to Plaintiff's request for records in a timely manner, and injunctive relief that the Defendant immediately and fully comply with Plaintiff's request under FOIA.
3. This case further seeks the Plaintiff be awarded reasonable attorneys' fees and legal costs incurred in pursuing this litigation, pursuant to 5 U.S.C. § 552(a)(4)(E)(i).

PARTIES

4. Plaintiff, Matthew O'Brien is a United States citizen who resides in Springfield, VA. Plaintiff is a former employee of the Defendant.
5. Defendant is an agency within the meaning of 5 U.S.C. § 552(f). The Defendant has possession and control of the requested records and is responsible for fulfilling Plaintiff's FOIA request.

JURISDICTION AND VENUE

6. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B). This Court also has jurisdiction pursuant to 28 U.S.C. § 1331.
7. Venue is proper pursuant to 5 U.S.C. § 552(a)(4)(B).

EXHAUSTION OF ADMINISTRATIVE REMEDIES

8. Plaintiff exhausted his administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C), because the Agency has missed its deadline to produce documents. *See also Nurse v. Sec'y of the Air Force*, 231 F. Supp. 2d 323, 328 (D.D.C. 2002) (FOIA "recognizes a constructive exhaustion doctrine for purposes of judicial review upon the expiration of certain relevant FOIA deadlines.").
9. On July 1, 2022, Plaintiff submitted a document request under the Freedom of Information Act and Privacy Act to the Department of Justice (DOJ) Executive Office for Immigration Review (EOIR). (Case No. 2022-45303.)
10. On November 3, 2022, the request was closed.
11. On December 2, 2022, Plaintiff appealed the closure of his FOIA request to the DOJ Office of Information Policy. (Case No. 2022-45303.)

12. On April 21, 2023, the Office of Information Policy remanded Plaintiff's request "for a further search or responsive records." (Case No. 2023-48754.)
13. On September 5, 2023, Plaintiff received an Interim Response. (Case No. 2023-48754.)
14. On November 16, 2023, Plaintiff appealed the initial determination regarding his FOIA request because Defendant's production was incomplete.
15. As of the filing of the Complaint, the Agency has not notified Plaintiff of any determination regarding Plaintiff's appeal.

STATUTORY FRAMEWORK

16. FOIA, 5 U.S.C. § 552, requires agencies of the federal government to release requested records to the public unless one or more specific statutory exemptions apply.
17. An agency must respond to a party making a FOIA request within 20 working days, notifying that party of at least the agency's determination whether or not to fulfill the request and the requester's right to appeal the agency's determination to the agency head. 5 U.S.C. § 552(a)(6)(A)(i).
18. FOIA, 5 U.S.C. § 552(a)(6)(B), permits a 10-day extension of time to respond in certain "unusual circumstances."
19. In "unusual circumstances," an agency may delay its response to a FOIA request or appeal but must provide written notice and "the date on which a determination is expected to be dispatched." 5 U.S.C. § 552(a)(6)(B)(i).
20. FOIA requests are supposed to be processed as having been filed under the FOIA statute *and* the Privacy Act. 5 U.S.C. § 552a(t)(1) and (2) (prohibiting reliance on FOIA exemptions to withhold under Privacy Act, and vice versa); H.R. Rep. No. 98-726, pt. 2, at 16-17 (1984), as reprinted in 984 U.S.C.C.A.N. 3741, 3790-91 (regarding amendment of Privacy Act in 1984

to include subsection (t)(2) and stating: Agencies that had made it a practice to treat a request made under either [the Privacy Act or the FOIA] as if the request had been made under both laws should continue to do so”); *Murray v. Shulkin*, 273 F. Supp. 3d 87, (D.D.C. 2017) (“[A]gencies routinely process requests for records under both statutes, consistent with the overarching goal of ‘open government, and especially, accessibility of government records.’” (citations omitted)).

FACTS UNDERLYING PLAINTIFF’S CLAIM FOR RELIEF

21. On July 1, 2022, via counsel, Plaintiff submitted a FOIA request to the Agency seeking the following records:

- a. Complaints and Recusal Motions.
 - i. Any informal or formal complaints filed against Judge O’Brien.
 - ii. Internal communications among EOIR employees regarding those complaints.
 - iii. Any informal or formal responses provided by Judge O’Brien to EOIR regarding complaints filed against him.
 - iv. Investigations by EOIR into complaints filed against Judge O’Brien.
 - v. EOIR’s disposition of the complaints filed against Judge O’Brien.
 - vi. Reports to EOIR that complaints filed against Immigration Judges were politically motivated or constituted harassment, intimidation, or abuse of the complaint process.
 - vii. EOIR’s investigation of and responses to all reports that complaints filed against Immigration Judges were politically motivated or constituted harassment, intimidation, or abuse of the complaint process.
 - viii. Complaints filed by Judge O’Brien against immigration attorneys.

- ix. Investigations by EOIR into complaints filed by Judge O'Brien against attorneys who practice in front of Immigration Courts.
- x. Actions taken by EOIR against immigration attorneys who were the subject of Judge O'Brien's complaints.
- xi. Communications regarding Immigration Judges between EOIR employees and outside, private attorneys including but not limited to Eileen Blessinger, Ellennita Hellmer, Alina Kirkpatrick, Anan Rahman, and Richard Vilmenay.
- xii. Recusal motions filed against Judge O'Brien and Judge O'Brien's responses.
- xiii. Concerns raised by Judge O'Brien to Assistant Chief Immigration Judge (ACIJ) Theresa Holmes-Simmons and ACIJ Karen Mayberry relating to recusal motions filed against Judge O'Brien.
- xiv. Actions taken by EOIR in response to Judge O'Brien's complaints and concerns relating to the recusal motions filed against him.
- xv. Audio recordings, video recordings, and transcripts from the hearings referenced in complaints about Judge O'Brien, including but not limited to the following:
 - xvi. The April 8, 2021, hearing that is the subject of Complaint 1700.
 - xvii. The February 11, 2021, and April 7, 2021, hearings that are the subject of Complaint 1699.
- xviii. EOIR policies and procedures relating to the filing and processing of formal complaints against Immigration Judges.
- xix. Any laws or regulations governing filing and processing of formal complaints against Immigration Judges.

b. Job Performance.

- i. Guidance or directives provided to Judge O'Brien concerning the substance of his decisions or his behavior during hearings.
- ii. Judge O'Brien's performance as an Immigration Judge, including but not limited to performance evaluations.
- iii. Judge O'Brien's conduct as an Immigration Judge, including but not limited to performance evaluations.
- iv. Judge O'Brien's suitability to be converted to a permanent appointment.
- v. The decision not to convert Judge O'Brien to a permanent appointment.
- vi. Feedback received from staff who worked with Judge O'Brien regarding his performance and suitability to be converted to a permanent appointment.
- vii. For every Immigration Judge in the Arlington Immigration Court, a breakdown of cases decided by each judge that includes: (1) the Judge's name, (2) counsel that appeared in front of the Judge for that matter, (3) the type of relief sought, (4) the outcome of the matter – i.e., was the requested relief granted, and (5) the date the decision was made.

c. Permanent Appointments.

- i. EOIR policies and procedures relating to temporary appointment of Immigration Judges.
- ii. EOIR policies and procedures relation to decisions to convert temporary appointments of Immigration Judges to permanent positions.
- iii. Identification of Immigration Judges who were converted from a term appointment to a permanent appointment.

- iv. Identification of Immigration Judges who were not converted from a term appointment to a permanent appointment. Identify the Court where that Immigration Judge was or is based.
- v. Identification of Immigration Judges who were newly appointed to term or permanent appointment. Identify the Court where that Immigration Judge was or is based.
- vi. Identification of Immigration Judges who EOIR terminated or attempted to terminate. Identify the Court where that Immigration Judge was or is based.
- vii. Identification of Immigration Judges who were disciplined, and the nature of the disciplinary action taken against them. Identify the Court where that Immigration Judge was or is based.

22. On December 2, 2022, Plaintiff appealed the closure of his FOIA request to the DOJ Office of Information Policy.

23. On April 21, 2023, the Office of Information Policy remanded Plaintiff's request "for a further search or responsive records."

24. On September 5, 2023, Plaintiff received an Interim Response which included production of documents. As relevant, EOIR's Interim Response stated the following:

A search was conducted and records responsive to Items 1, 2, 3, 4, 5, and 6 of the Job Performance section and Items 1, 2, 3, 4, 5, and 6 of the Permanent Appointment section of your request were located. We are granting partial access to the responsive records. Additional documents will be provided as they become available.

Portions of the enclosed records have been redacted in accordance with FOIA Exemption 5, 5 U.S.C. § 552(b)(5), which concerns certain inter- and intra-agency communications protected by the deliberative process privilege, attorney work-product doctrine, and/or the attorney-client privilege.

Additionally, portions of the enclosed records have been redacted in accordance

with FOIA Exemption 6, 5 U.S.C. § 552(b)(6), which concerns material the release of which would constitute a clearly unwarranted invasion of the personal privacy of third parties.

25. The Agency's use of exemptions under 5 U.S.C. § 552(b)(5) and (b)(6) appear to have resulted in the improper withholding or redacting of numerous documents.
26. There is no Privacy Act exemption identified.
27. One of the documents produced was a memorandum dated May 6, 2022, with the subject line: "Recommendation to decline to convert Immigration Judge to Permanent Appointment following the Two-Year Temporary Appointment."
28. Almost the entirety of the 12-page memorandum is redacted, primarily relying on exemption (b)(5) (privilege), and occasionally (b)(5) and (b)(6) (privacy).
29. The memo was a recommendation by a supervisor about whether to continue with Plaintiff's employment.
30. The Agency has not indicated what type of privilege it believes to be implicated by the information in the memo at issue.
31. It would not be properly subject to a discovery withholding under the principle of privilege.
32. The Agency also produced, but heavily redacted, a performance evaluation of the requestor.
33. This documentation should also be produced to the requestor in full under FOIA and the Privacy Act.
34. On November 16, 2023, Plaintiff appealed the Interim Response (Appeal No. a-24-00359).

PLAINTIFF'S CLAIMS FOR RELIEF

COUNT 1

Failure to Promptly Produce Records Under the Freedom of Information Act
(5 U.S.C. § 552(a)(3)(A), (a)(8)(A)(ii))

35. Plaintiff repeats and realleges every allegation in the Complaint.

36. Plaintiff, through counsel, properly appealed Defendant's interim determination regarding his FOIA request on September 5, 2023.
37. Defendant has not provided a determination to the Plaintiff as to whether the Agency intends to respond to the Plaintiff's appeal.
38. Defendant has also not produced the requisite records to Plaintiff in response to his FOIA request.
39. Defendant's search was not reasonably calculated to uncover all relevant documents, and/or Defendant acted in bad faith.
40. Plaintiff properly exhausted administrative remedies.
41. The Agency violated FOIA's mandate to release agency records to the public by failing to release the records Plaintiff specifically requested. 5 U.S.C. § 552(a)(3)(A), 552(a)(4)(B).
42. The Agency improperly applied exemptions under 5 U.S.C. § 552(b)(5) and (b)(6).
43. Accordingly, Plaintiff is entitled to injunctive and declaratory relief with respect to the release and disclosure of the records requested in Plaintiff's FOIA request.

COUNT 2

Failure to Conduct Adequate Search Under the Freedom of Information Act
(5 U.S.C. § 552(a)(3)(C))

44. Plaintiff repeats and realleges every allegation in the Complaint.
45. Plaintiff, through counsel, properly appealed Defendant's interim determination regarding his FOIA request on September 5, 2023.
46. Defendant has not provided a determination to the Plaintiff as to whether the Agency intends to respond to the Plaintiff's appeal.
47. Defendant has also not produced the requisite records to Plaintiff in response to his FOIA request.

48. Defendant's search was not reasonably calculated to uncover all relevant documents, and/or Defendant acted in bad faith.
49. Plaintiff properly exhausted administrative remedies.
50. The Agency violated FOIA's mandate to release agency records to the public by failing to release the records Plaintiff specifically requested. 5 U.S.C. § 552(a)(3)(A), 552(a)(4)(B).
51. The Agency improperly applied exemptions under 5 U.S.C. § 552(b)(5) and (b)(6).
52. Accordingly, Plaintiff is entitled to injunctive and declaratory relief with respect to the release and disclosure of the records requested in Plaintiff's FOIA request.

COUNT 3

Failure to Meet Statutory Deadlines Under the Freedom of Information Act (5 U.S.C. § 552(a)(6)(A)(i))

53. Plaintiff repeats and realleges every allegation in the Complaint.
54. Plaintiff, through counsel, properly appealed Defendant's interim determination regarding his FOIA request on September 5, 2023.
55. Defendant has not provided a determination to the Plaintiff as to whether the Agency intends to respond to the Plaintiff's appeal.
56. Defendant has also not produced the requisite records to Plaintiff in response to his FOIA request.
57. Plaintiff properly exhausted administrative remedies.
58. Plaintiff is not required to exhaust otherwise applicable administrative remedies with respect to the Agency's failure to respond within the statutory time period.
59. The Agency violated FOIA's mandate to release agency records to the public by failing to release the records Plaintiff specifically requested. 5 U.S.C. § 552(a)(3)(A), 552(a)(4)(B).
60. The Agency improperly applied exemptions under 5 U.S.C. § 552(b)(5) and (b)(6).

61. Accordingly, Plaintiff is entitled to injunctive and declaratory relief with respect to the release and disclosure of the records requested in Plaintiff's FOIA request.

CONCLUSION

62. WHEREFORE, Plaintiff respectfully requests this Court:

- a. Declare that the Agency violated FOIA by failing to lawfully satisfy Plaintiff's July 1, 2022, FOIA request;
- b. Order the Agency to process and release immediately all records responsive to Plaintiff's July 1, 2022, FOIA request at no cost to Plaintiff;
- c. Retain jurisdiction of this action to ensure the processing of Plaintiff's FOIA request and that no agency records are wrongfully withheld;
- d. Award Plaintiff his reasonable attorney's fees and litigation costs in this action pursuant to 5 U.S.C. § 552(a)(4)(E);
- e. Award Plaintiff compensatory relief for damages Plaintiff has suffered due to Defendant's violation; and
- f. Award any additional relief the Court deems just.

Dated: January 28, 2024

Respectfully submitted,



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