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Via Online Submission
United States Department of Justice
Office of Information Policy
441 G Street NW, Sixth Floor
Washington, D.C. 20001

September 2, 2020

Re: FOIA Case No. EOUSA-2019-004614

To Whom It May Concern:

This letter serves as an administrative appeal of the de facto denial by the US Department of Justice, because of its failure to provide an adequate response to Mr. de la Cruz's Freedom of Information Act ("FOIA") request within the statutory timeframe. See 5 U.S.C. § 552(a)(6)(A)(i).

Introduction

This very specific and detailed request was submitted on September 20, 2019, and was assigned Case Number EOUSA-2019-004614. The request sought from the US Department of Justice:

"Any and all documents which mention or refer to Sergio de la Cruz, relating to or arising from the allegations in the complaint in US v. Luka Grishaj, Sergio de la Cruz, et

al, Case No. 1:07-mj-01363, and the indictment in USA v. Grishaj, Case No. 07-cr—1158, filed in the Southern District of New York in 2007, including but not limited to:

Police reports, FBI reports, FBI Forms 302, DEA reports, DEA Forms DEA 6, warrant applications, whether filed or not, documents prepared for and/or filed in support of any warrant applications including but not limited to probable cause affidavits, any and all warrants signed, any and all warrant applications denied along with the reason for the denial, surveillance reports and notes, video or audio recordings, lab reports, cooperation agreements, notes relating to any cooperation agreements, notes of any meetings with Mr. de la Cruz and/or his attorney John Burke, lab reports, probation reports, pre-sentence reports, and any other documents not specifically mentioned above.”

A copy of the email from the FOIA on-line unit confirming receipt of this request is annexed hereto as Exhibit A. On October 1, 2019, our request for expedited processing was denied, on the basis that it did not meet the criteria for expedited processing. A copy of the email denying this request is annexed hereto as Exhibit B. The requestor, through the undersigned counsel, agreed to pay up to \$250 for the costs of duplication and search time. See Exhibit C. According to the FOIA on-line submission details downloaded on September 2, 2020, the estimated completion date was October 21, 2019 (over ten months ago), and the current status of the request is “under agency review”.

Mr. de la Cruz considers this continued failure to make a determination and provide responsive documents to be a constructive denial of his FOIA request, and hereby appeals this constructive denial, as well as the agency’s failure to make a FOIA “determination” and provide responsive documents within the statutory timeline.

Argument

a. The Bureau did not meet FOIA's default determination timeframe.

FOIA requires that an agency determine whether it will comply with a record request within 20 working days of receipt and immediately notify the requester of the determination, see 5 U.S.C. § 552(a)(6)(A)(i)(I). Following this determination, the agency “shall make the records promptly available” to the requester, see 5 U.S.C. § 552(a)(3)(A). The statute thus requires that agencies make a determination within twenty days of a request, and that it actually produce the responsive records “typically . . . within days or a few weeks of a ‘determination,’ not months or years.” *Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm’n*, 711 F.3d 180, 188 (D.C. Cir. 2013)

The agency has clearly failed to respond to the FOIA Request within the parameters mandated by the statute. The initial response merely acknowledged receipt of the FOIA request, and the most recent inquiry response provides a projected completion deadline of October 2019 – almost ten months ago, obviously well outside the 20-day statutory timeframe.

b. The agency's failure to make a determination and produce documents constitutes a de facto denial and unlawful withholding of non-exempt documents.

In amending FOIA in 1974, “Congress evinced an increasing concern over the timeliness of disclosure, recognizing that delay in complying with FOIA requests may be tantamount to denial. ACLU, 339 F.Supp.2d at 504 (quoting H. Rep. No. 876, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Admin. News, 6267, 6271).” *Brennan Ctr. for Justice at New York Univ. Sch. of Law v. United States Dep't of State*, 300 F. Supp. 3d 540, 546 (S.D.N.Y. 2018) (internal quotations omitted). Thus, the amended FOIA, at 5 U.S.C. § 552(a)(6)(A)(i), requires an agency to determine, “within twenty working days, whether or not to comply with a FOIA

request.” “An agency's failure to comply with [the statute's] time limits may be treated as ‘constructive exhaustion’ of administrative remedies,” and authorizes “the requester to seek judicial review immediately.” *Elec. Privacy Info. Ctr. v. Dep't of Justice*, 416 F. Supp. 2d 30, 36 (D.D.C. 2006).

Unreasonable delays in disclosing non-exempt documents thus violate the intent and purpose of FOIA and often frustrate the purpose for which the information is sought. Here, the documents requested are needed in order to help prove to the US Consulate in Mexico that Mr. de la Cruz is not inadmissible to the US; as explained in the request to expedite these records (at Exhibit B), while we are waiting to receive these documents and address this issue with the consular officials there, he remains stuck in Mexico, a country in which he has not lived for many years, separated from his US citizen husband, without proper access to healthcare and employment. Further delay will make it even more difficult to have the consular officials review their earlier finding that he is inadmissible and may thus render the request pointless. This delay in making a determination therefore amounts to a constructive and de facto denial of his FOIA request for documents to which he is entitled.

Conclusion

Mr. de la Cruz requests that the Department make a determination regarding his request within twenty days, as prescribed under 5 U.S.C. § 552(a)(6)(A)(iii), and that all documents within its scope be disclosed. If any documents or portions of documents are withheld, Mr. de la Cruz requests an index or similar statement of the scope of the material withheld and a citation to

the specific FOIA exemption section upon which the nondisclosure is based with an adequate explanation for why the exemption is applicable. Such index should also include information identifying the author, recipient and any copyees, a summary of the content, and the title and date.

The determination should be sent to:

Paul O'Dwyer
Law Office of Paul O'Dwyer PC
40 Fulton Street, Floor 23
New York NY 10038
paul.odwyer@paulodwyerlaw.com


Sincerely,

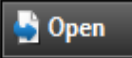
A handwritten signature in black ink, appearing to read "P. O'Dwyer", written over a horizontal line.

Paul O'Dwyer

A

Home / Work email / Inbox / Sergio de la Cruz / 1 item

From	Subject	Date	Attachments	Size
 admin@foiaonline.gov	FOIA Request EOUSA-2019-004614 Submitted	9/20/2019 6:59:12 PM		109.8 KB

FOIA Request EOUSA-2019-004614 Submitted.pdf 1 / 1 78.4% 

From: admin@foiaonline.gov
To: paul.odwyer@paulodwyerlaw.com
Subject: FOIA Request EOUSA-2019-004614 Submitted
Date: Friday, September 20, 2019 6:59:12 PM

This message is to confirm your request submission to the FOIAonline application: [View Request](#). Request information is as follows:

- Tracking Number: EOUSA-2019-004614
- Requester Name: Mr. Paul O'Dwyer
- Date Submitted: 09/20/2019
- Request Status: Submitted
- Description: Any and all documents which mention or refer to Sergio de la Cruz, relating to or arising from the allegations in the complaint in US v. Luka Grishaj, Sergio de la Cruz, et al, Case No. 1:07-mj-01363, and the indictment in USA v. Grishaj, Case No. 07-cr—1158, filed in the Southern District of New York in 2007, including but not limited to:
Police reports, FBI reports, FBI Forms 302, DEA reports, DEA Forms DEA 6, warrant applications, whether filed or not, documents prepared for and/or filed in support of any warrant applications including but not limited to probable cause affidavits, any and all warrants signed, any and all warrant applications denied along with the reason for the denial, surveillance reports and notes, video or audio recordings, lab reports, cooperation agreements, notes relating to any cooperation agreements, notes of any meetings with Mr. de la Cruz and/or his attorney John Burke, lab reports, probation reports, pre-sentence reports, and any other documents not specifically mentioned above.

B

From: admin@foiaonline.gov
To: paul.odwyer@paulodwyerlaw.com
Subject: FOIA Expedited Processing Disposition Reached for EOUSA-2019-004614
Date: Tuesday, October 1, 2019 5:33:46 PM

Your request for Expedited Processing for the FOIA request EOUSA-2019-004614 has been denied. Additional details for this request are as follows:

- Request Created on: 09/20/2019
- Request Description: Any and all documents which mention or refer to Sergio de la Cruz, relating to or arising from the allegations in the complaint in US v. Luka Grishaj, Sergio de la Cruz, et al, Case No. 1:07-mj-01363, and the indictment in USA v. Grishaj, Case No. 07-cr—1158, filed in the Southern District of New York in 2007, including but not limited to:
Police reports, FBI reports, FBI Forms 302, DEA reports, DEA Forms DEA 6, warrant applications, whether filed or not, documents prepared for and/or filed in support of any warrant applications including but not limited to probable cause affidavits, any and all warrants signed, any and all warrant applications denied along with the reason for the denial, surveillance reports and notes, video or audio recordings, lab reports, cooperation agreements, notes relating to any cooperation agreements, notes of any meetings with Mr. de la Cruz and/or his attorney John Burke, lab reports, probation reports, pre-sentence reports, and any other documents not specifically mentioned above.
- Expedited Processing Original Justification: Mr. de la Cruz is currently in Mexico, where he has not lived for many years, because his immigrant visa was denied as a result of the above case. This denial is pending consular review which is contingent on a response to the above request. He is unable to return to the US until this review is completed. During this time he is separated from his US citizen husband and family and lacks proper access to healthcare and employment, and is concerned because of the level of violent crime there. For this reason we are asking that you expedite this FOIA request.
- Expedited Processing Disposition Reason: Does not meet any of the four standards required for approval of extraordinary treatment. See attached correspondence.

C

THIS IS NOT A BILL. DO NOT SEND MONEY

Request No. EOUSA-2019-004614

CHOOSE ONE

I wish to modify my request in an attempt to obtain a quicker response and/or reduce fees as follows:

I understand that I am entitled to the first 100 pages and two hours of search time for free. Please do not search beyond two hours, nor duplicate beyond 100 pages.

I agree to pay up to the following amount for duplication and search time:

\$ 250 _____

I understand that this payment is required even if no documents are located or released to me. In the event that documents are located and released to me, I understand that I may be charged duplication fees in addition to search fees.

I wish to withdraw my request.


Signature

9.30.2019
Date

Please return to:
EOUSA
FOIA/PA
175 N Street, NE, 5th Floor, FOIA Suite
Washington, DC 20530