IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERATION FOR AMERICAN IMMIGRATION REFORM, Plaintiff, v. U.S. CITIZENSHIP AND IMMIGRATION SERVICES, Defendant.	)	Civil Action No. 23-3429 (JMC)

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

ARGUMENT

I. Plaintiff's Complaint and FOIA Request Reasonably Describe Records Sought

The words of the Freedom of Information Act ("FOIA" or "the statute") could hardly be much clearer: "each agency, upon any request for records which (i) reasonably describes such records … shall make the records promptly available to any person." 5 U.S.C. § 552(a)(3)(A).

The records Plaintiff requested from Defendant were reasonably described in Plaintiff's initial FOIA request and again in its Complaint instituting this lawsuit: records of communications between Defendant's employees and Tania Mattos from January 20, 2021 to May 11, 2022. These records were not promptly provided by Defendant (not even in part) and they still have not been: not within the twenty working days provided for in the statute, *see* 5 U.S.C. § 552(a)(6)(A)(i), not within the approximately seventeen months after that deadline expired when Plaintiff could already have filed suit at any time but did not, *see* 5 U.S.C. §§ 552(a)(6)(C)(i) and 552(a)(4)(B), *Khine v. DHS*, 943 F.3d 959 (D.C. Cir. 2019), and not within the more than three months since this suit was filed.

The words of the United States Court of Appeals for the District of Columbia Circuit could hardly be much clearer either: "a request certainly should not fail where the agency knew or should have known what the requester was seeking all along." *Inst. for Justice v. IRS*, 941 F.3d 567, 572 (D.C. Cir. 2019). Defendant in this case knew or at the very least should have known what Plaintiff was seeking all along, so Defendant's Motion to Dismiss, ECF No. 10, must be denied. The rest is either details or sophistry.

Defendant's argument, at base, is astonishing in its audacity: a straightforward request for agency employee communications with one private individual over a limited timeframe, Defendant contends, does not "reasonably describe" the records sought within the meaning of

FOIA, *see* ECF 10-1, Memo. of Points and Authorities in Support of Defendant's Motion to Dismiss (hereinafter "Memo. in Support"), p. 5 ¶ 1 and *passim*: not on the face of the words of Plaintiff's Complaint itself, nor even of the underlying FOIA request, but simply because any compliance with the statute at all would apparently just be too difficult, too monumentally grandiose a task to accomplish even with the staggering resources available to it. And such compliance, Defendant claims, would not merely be impossible within the twenty-day deadline of FOIA, but even now or even presumably at any time in the future, even after Defendant produced no records whatsoever in response to Plaintiff's FOIA request for roughly a year and a half before this suit was filed.

Of course, Plaintiff absolutely recognizes that the test for whether records sought are "reasonably described" within the meaning of the statute is the objective one of *Truitt v. Dep't of State*, 897 F.2d 540, 545 n.36 (D.C. Cir. 1990): "whether "a professional employee of the agency who was familiar with the subject area of the request [can] locate the record[s] with a reasonable amount of effort." But this does not help Defendant's argument. The idea that Plaintiff's initial request and its Complaint do not meet this test is, quite frankly, absurd. They say very clearly what they seek.

Indeed, the *Truitt* court itself adopted this test precisely as a rejection of more exacting and demanding standards for FOIA requests remarkably similar to those advanced by Defendant's Motion, recognizing that the 1974 amendment to the statute that adopted the term "reasonably describes" in the first place "was 'designed to ensure that a requirement for a specific title or file number cannot be the only requirement of an agency for the identification of documents.'" *Id.* (quoting S. Rep. No. 93-854, 93d Cong., 2d Sess. 10 (1974)). Likewise with

Defendant's baseless demands that Plaintiff narrow its request to seek only records from specific offices or employees. *See* Memo. in Support p. 9 ¶ 3.

Moreover, to accept this argument would require the Court to accept Defendant's disparagement of its own employees, throwing them under the proverbial bus as incompetent to decipher and fulfill FOIA requests in plain English, even given far more time than the statute provides for and even when presumably that is what the professionals in Defendant's FOIA office were hired to do.

This begs the question: if Plaintiff's request does not "reasonably describe" the records sought within the meaning of the statute, what request ever would? Surely not the entire broad variety of requests citizens send their federal agencies requesting records from them every single day. Yet FOIA is supposed to provide meaningful access to public records for "any person," not just attorneys, let alone a specialized clerisy of FOIA lawyers.

The mere fact that Plaintiff's request might conceivably require Defendant to search for and produce a large volume of records does not by itself mean Plaintiff failed to "reasonably describe" such records: indeed, "the number of records requested appears to be irrelevant to the determination of whether they have been 'reasonably described.'" *Yeager v. Drug Enforcement Admin.*, 678 F.2d 315, 326 (D.C. Cir. 1982). *See also Tereshchuk v. Bureau of Prisons*, 67 F.Supp.3d 441, 454-55 (D.D.C. 2014) ("This Court is skeptical that a FOIA request may be denied based on sheer volume of records requested. … In fact, the statute anticipates requests for voluminous records").

Though couched as a Motion to Dismiss based on the purportedly somehow defective words of Plaintiff's Complaint, the essence of Defendant's Motion is a contention that Plaintiff is seeking to impose undue burdens on Defendant in conducting a records search. But the

reasonableness or sufficiency of an agency's search and its ability to actually produce responsive records is, if anything, a highly fact-sensitive evidentiary question for summary judgment, *see, e.g., Reporters Comm. for Freedom of Press v. FBI*, 877 F.3d 399 (D.C. Cir. 2017); *Aguiar v. DEA*, 865 F.3d 730 (D.C. Cir. 2017); *Defenders of Wildlife v. U.S. Border Patrol,* 623 F.Supp.2d 83, 87 (D.D.C. 2009) ("FOIA cases typically and appropriately are decided on motions for summary judgment"), where even then the government carries a high burden to "demonstrate beyond material doubt that its search was reasonably calculated to uncover all relevant documents." *Valencia-Lucena v. United States Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999) (citations omitted). It is not a question as to the facial sufficiency of a complaint at so early a stage of proceedings as to warrant dismissal. Therefore Defendant's Motion is, at best, dramatically premature, and even if we were already at the summary judgment stage, "[t]his Court will not find a search unduly burdensome on conclusory statements alone." *Hall v. Central Intelligence Agency*, 881 F.Supp.2d 38, 53 (D.D.C. 2012).

Notably, even most of the cases Defendant's Motion principally relies upon reached the summary judgment stage in the district court before being appealed, i.e., the issue of whether a complaint or an underlying FOIA request was facially defective in failing to reasonably describe records sought, warranting dismissal, was not the question before the court in these cases at all. *See, e.g., Nat'l Sec. Counselors v. CIA*, 969 F.3d 406 (D.C. Cir. 2020) (decided on appeal of summary judgment and holding in part that a request would require the creation of new records, which Defendant's Motion does not even contend); *Evans v. Fed. Bureau of Prisons*, 951 F.3d 578 (D.C. Cir. 2020) (decided on appeal of summary judgment where the district court heard evidence regarding whether a search would be unduly burdensome); *Ctr. for the Study of Servs. v. HHS*, 874 F.3d 287, 289 (D.C. Cir. 2017) (decided on appeal of summary judgment where

"[t]he basic dispute in the district court centered on the agency's invocation of Exemption 4"); *Kowalczyk v. Dep't of Justice*, 73 F.3d 386 (D.C. Cir. 1996) (decided on appeal of summary judgment where the district court heard evidence as to the scope and sufficiency of a search); *Truitt*, 897 F.2d 540 at 542 (decided on appeal of summary judgment for an agency after it had completed its searches, the district court heard evidence as to the adequacy of the search, and the circuit court reversed and vacated summary judgment holding even then that summary judgment in the agency's favor "is not proper.")

While paying lip service that "[f]or purposes of Rule 12(b)(6) only, Defendant assumes that the facts alleged in the complaint are true and "grant[ing] [P]laintiff the benefit of all inferences that can be derived from the facts alleged,"" Memo. in Support p. 5 fn. 1 (quoting *Grant v. Ent. Cruises, Inc.*, 282 F. Supp. 3d 114, 116 (D.D.C. 2017), Defendant's Motion also imagines the scope of Plaintiff's request into a hypothetical parade of horribles by essentially portraying the request as far broader than it actually is. This line of argument starts where Defendant's Motion says "[o]n its face, the request can be reasonably interpreted to encompass any document that is ***related to*** communication between a USCIS employee and Ms. Mattos." Memo. in Support p. 11 ¶ 2 (emphasis added).

But the request "on its face" cannot "be reasonably interpreted to encompass" any such thing. On its face literally means its actual words, not other words it might have used but did not. If the term "related to," "pertaining to," "about" or something else comparable had in fact been used in Plaintiff's FOIA request, Defendant might well have a point, *see, e.g.*, *American Ctr. for Law & Justice v. DHS*, 573 F.Supp.3d 78 (D.D.C. 2021); *Sack v. CIA*, 53 F.Supp.3d 154 (D.D.C. 2014); *Dale v. IRS*, 238 F.Supp.2d 99 (D.D.C. 2002), but this is simply not the case before the Court, which seeks only records of actual communications between Defendant's

employees and Ms. Mattos, not records arguably more vaguely "related to" such communications.

By acting as though the term "related to" was used in Plaintiff's request when it was not, Defendant's Motion aims to broaden Plaintiff's request into the realm of possible impermissibility by creating vagueness or ambiguity in the request where none exists. But of course Plaintiff did not actually use this term, so whether its use in some other request would justify dismissal of some other suit is entirely academic.

Respectfully, none of the cases Defendant's Motion relies upon are analogous to this suit. This suit does not require Defendant's employees to "speculate" as to what records it seeks. *Kowalczyk*, 73 F.3d at 389. This suit does not seek let alone require a "fishing expedition." *Cause of Action Inst. v. IRS*, 253 F.Supp.3d 149, 160 (D.D.C. 2017). It does not require a search that would be "unduly burdensome" or require "a massive undertaking," *American Ctr.*, 573 F.Supp.3d at 87 (citations omitted), particularly since Defendant has already been given more than a year and a half head start (whether or not Defendant has taken advantage of this). It only seeks records of actual communications between Defendant's employees and Ms. Mattos.

This suit is far more analogous to *Shapiro v. CIA*, 170 F. Supp. 3d 147 (D.D.C. 2016), though Plaintiff's request in this suit is actually narrower than the request that the district court held "reasonably described" records sought in that case. In *Shapiro*, the Plaintiff requested "any and all records that were prepared, received, transmitted, collected and/or maintained by the [agencies] mentioning" Nelson Mandela or two of Mandela's aliases. *Id.* at 152. The Central Intelligence Agency ("CIA") moved to dismiss arguing essentially the same as Defendant's Motion in this case, namely that Plaintiff's FOIA request and complaint were facially defective for failing to "reasonably describe" records sought.

The *Shapiro* court denied the CIA's motion to dismiss, explaining:

> [W]hen a defendant alleges that a FOIA request does not reasonably describe the records sought, there is a difference in kind between requests for documents that "mention" or "reference" a specified person or topic and those seeking records "pertaining to," "relating to," or "concerning" the same. FOIA's reasonable-description requirement does not doom requests that *precisely* describe the records sought, even if compliance might overwhelm an agency's response team.

Id. at 155 (emphasis in original).

Just as the CIA did in *Shapiro*, so Defendant in this case "simply assert[ed] in its legal briefing that the documents [Plaintiff] requests could not be 'locate[d] . . . with a reasonable amount of effort.'" *Id.* at 156 (citations omitted). Yet the court held Shapiro's request "conveys exactly which records he seeks," *id.*, and so does Plaintiff's, which is narrower than Shapiro's because it seeks only records of communication with her, not all mentions of her. "[C]ompliance should involve virtually no guesswork," *id.* at 154, both in Shapiro's case, and in this case: search for Ms. Mattos's name, eliminate records that are not employee communications with her, and provide those that are to Plaintiff. If Defendant doesn't locate every responsive record by doing this, that's still infinitely better than nothing: "FOIA does not require perfection". *Id.* at 156.

Ultimately, the standard that Defendant's Motion would have the Court impose in this case turns FOIA on its head and would not merely allow for but outright require the routine dismissal of a great many if not most FOIA suits, frustrating Congress's intent in enacting FOIA in general, and in enacting the statute's judicial remedies in particular, effectively into oblivion.

FOIA is meant to be a sword in the hands of requesters, not a shield in the hands of the agencies. The underlying purpose of the statute is not the convenience of the government or its employees: it is the assurance of prompt access to public records by requesters and of the maximum transparency practicable to the public as a whole. *See Dept. of Defense v. Fed. Labor*

Relations Auth., 510 U.S. 487, 495 (1994) (quoting *Dept. of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 777 (1989)) (explaining that "the core purpose of FOIA . . . is contributing significantly to public understanding of the operations or activities of the government") (emphasis and internal quotation marks omitted); *Dept. of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (stating that FOIA's purpose is "to pierce the veil of administrative secrecy and open agency action to the light of public scrutiny"); *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 17 (1974) (quoting *Frankel v. SEC*, 460 F.2d 813, 816 (2d Cir. 1972), *cert. denied*, 409 U.S. 889 (1972)) ("Congress 'was principally interested in opening administrative processes to the scrutiny of the press and general public'").

Again and again, both Congress and the courts have stressed that in nearly every conceivable context FOIA is meant to favor requesters over the agencies. *See, e.g.*, 5 U.S.C. § 552(a)(4)(B) (putting the burden on agencies to prove they properly withheld information under a FOIA exemption); 5 U.S.C. § 552(a)(8)(A)(i)(I)-(II)) (requiring an agency to disclose information even if covered by an exemption unless it "reasonably foresees that disclosure would harm an interest protected by an exemption," or if disclosure is legally prohibited); 5 U.S.C. § 552(d) (providing that FOIA "does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in" the statute itself); S.Rep.No.813, 89th Cong., 1st Sess. 3 (1965) (explaining that FOIA "establish[es] a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language"); *Rose*, 425 U.S. at 361 ("these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act"); *Wis. Project On Nuclear Arms Control v. Dept. of Commerce*, 317 F.3d 275 (D.C. Cir. 2003)(quoting *Dept. of*

State v. Ray, 502 U.S. 164, 173) (1991) ("FOIA accordingly mandates a 'strong presumption in favor of disclosure'").

Nonetheless, the interpretation of "reasonably describes" that Defendant's Motion insists upon would have the Court take the opposite position, putting the burden on requesters to scale some still-unclear heights of perfection in their initial pleadings and allowing agencies to hide behind their own novel interpretations of FOIA requests rather than complying with those requests' plain language as the statute clearly requires.

To be blunt, FOIA's judicial remedies exist for enforcing the terms of the statute when an agency has already failed to do its job by complying with those terms—as Defendant has in this case to an already staggering degree—not for still further compounding an agency's ability to continue evading its legal obligations.

Defendant's Motion to Dismiss does nothing to change the facts that Plaintiff requested reasonably-described agency records from Defendant more than a year and a half ago and still has received nothing in response. In light of such facts, dismissal of this suit would only add insult to injury.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court deny Defendant's Motion to Dismiss.

Dated: 2/20/24

Respectfully submitted,

MATTHEW J. O'BRIEN
DC Bar No. 90012700
Immigration Reform Law Institute (IRLI)
25 Massachusetts Ave., NW, Suite 335
Washington, DC 20001
Telephone: (202) 232-5590
FAX: (202) 464-3590
Email: mobrien@irli.org

Counsel for Plaintiff