

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

AMERICAN CENTER FOR LAW AND JUSTICE,)	
)	
Plaintiff,)	
)	
vs.)	Case Action No. 16-cv-1355-RC
)	
UNITED STATES DEPARTMENT OF STATE,)	
)	
Defendant.)	

JOINT STATUS REPORT AND PLAINTIFF’S PROPOSED BRIEFING SCHEDULE

On September 12, 2016, the Court ordered the parties to meet and confer, and submit an agreed briefing schedule. Counsel for the parties conferred pursuant to the Court’s Order, but were unable to reach an agreement regarding whether the case is in a posture for briefing on dispositive motions. Accordingly, the parties submit their own respective statements to the Court. Plaintiff submits its proposed briefing schedule, and Defendant submits its proposed schedule for releasing responsive, non-exempt documents to Plaintiff, as follows:

I. Plaintiff’s Statement to the Court and Proposed Briefing Schedule

Pursuant to the Court’s order, Plaintiff proposes the following briefing schedule:

- a. Plaintiff will file its dispositive motion by November 2, 2016;
- b. Defendant will file its dispositive motion and its opposition to Plaintiff’s dispositive motion(s) by December 2, 2016;
- c. Plaintiff will file its opposition to Defendant’s dispositive motion and its reply in support of its dispositive motion by December 29, 2016; and
- d. Defendant will file its reply in support of its dispositive motion by January 29, 2017.

1. Plaintiff intends to file a Motion for Summary Judgment and briefing thereon is not premature.¹ At least where, as here, an agency has yet to produce any records, an agency's failure to timely respond as required by the statute not only allows direct access to federal court, but it also constitutes an 'improper withholding' of records under the Act.² The statute expressly vests the Court with the authority "to enjoin the agency from *withholding agency records* and to order the production of any agency records *improperly withheld* from the complainant." 5 U.S.C. § 552(a)(4)(B) (emphasis added); see *United States DOJ v. Tax Analysts*, 492 U.S. 136, 151 n.12 ("Even when an agency does not deny a FOIA request outright, the requesting party may still be able to claim 'improper' withholding by alleging that the agency has responded in an inadequate manner.").

2. "[A]n untimely response is a violation of FOIA, regardless of the final outcome of the request" and such a noncompliant response constitutes an "improper withholding." *Or. Natural Desert Ass'n v. Gutierrez*, 409 F.Supp.2d 1237, 1248 (D. Or. 2006) (granting summary judgment to plaintiff and concluding plaintiff was entitled to a declaratory judgment that noncompliant response constituted improper withholding under Act).³

¹ The parties had agreed to confer by telephone on Friday, September 23, 2016. Fourteen minutes before the agreed

² *Gilmore v. United States Dep't of Energy*, 33 F. Supp. 2d 1184, 1187 (N.D. Cal. 1998) ("the Supreme Court appears to consider an untimely response to a FOIA request to be a separate injury to the requesting party, even if the requested document could be properly withheld."); *id.* at 1188 (finding agency's "failure to make a timely determination as to whether [the] . . . documents should be disclosed constituted an improper withholding of those documents in violation of the FOIA"); *id.* at 1186 (referencing where court "found in its [own earlier] summary judgment opinion that even though Gilmore's FOIA request was properly denied, Gilmore has an independent cause of action against the DOE for violating the FOIA by failing to respond to his request and others within the statutory time limits").

³ *Id.* ("an untimely determination" is "an improper withholding under the Act."); *Our Children's Earth Found. v. Nat'l Marine Fisheries Serv.*, 85 F. Supp. 3d 1074, 1090 (N.D. Cal. 2015) (agency's "failure to comply with the FOIA's time limits is, by itself, a violation of the FOIA" (citation omitted)); *Info. Network for Responsible Mining v. BLM*, 611 F. Supp. 2d 1178, 1183 (D. Colo. 2009) ("It is undisputed that the [agency's] response to [the requestor]'s FOIA request, filed months after the statutory deadline and after [requestor] commenced this action to compel a response, violated the 20-day response deadline mandated by FOIA. As a result, I find the [agency] violated FOIA by failing to comply with this statutory deadline and that this failure resulted in an improper withholding under FOIA."); *Fiduccia v. United States DOJ*, 185 F.3d 1035, 1041 (9th Cir. 1999) ("Congress gave agencies 20 days, not years, to decide whether to comply with requests . . ." (emphasis in original)).

3. As one court put it, “[a] plaintiff has suffered an injury in fact when he does not receive information that Congress has commanded must be provided to him. In the context of the Freedom of Information Act (FOIA), 5 U.S.C.S. § 552, given Congress’ particular concern with delays in agencies’ responses to information requests, an agency’s failure to comply with the FOIA’s time limits is, by itself, a violation of the FOIA.” *S. Yuba River Citizens League v. Nat’l Marine Fisheries Serv.*, 2008 U.S. Dist. LEXIS 107177, *17 (E.D. Cal. 2008) (citations omitted); *see Munger, Tolles & Olson LLP v. United States Dep’t of Army*, 58 F. Supp. 3d 1050, 1056 (C.D. Cal. 2014) (“The Court finds that the Army’s unreasonable delay violated FOIA’s timeliness requirements.”).⁴

4. As of the date the Complaint was filed and up to the current date, “Defendant has failed to notify Plaintiff of any determination about whether Defendant will comply with Plaintiff’s FOIA request, the reasons for any such determination, or Plaintiff’s right to appeal any adverse determination to the head of the agency.” Comp. [Doc. #1] ¶ 35. As to this key allegation, “*Defendant admit[ted] that it has not issued a final response to Plaintiff’s FOIA request with a*

⁴ In the District of Columbia Circuit, the matter is not clearly settled. Where the agency has produced responsive records, however untimely, this Court has ruled that “a lack of timeliness or compliance with FOIA deadlines does not preclude summary judgment for an agency, nor mandate summary judgment for the requester.” *Landmark Legal Found. v. EPA*, 272 F. Supp. 2d 59, 68 (D.D.C. 2003) (citing *Atkins v. Dep’t of Justice*, 1991 U.S. Dist. LEXIS 22309, 1991 WL 185084 (D.C. Cir. Sept. 18, 1991) (unpub.) (“The question whether DEA complied with the Freedom of Information Act’s (FOIA) time limitations in responding to Aaron Atkins’ request is moot because DEA has now responded to this motion.”); *Tijerina v. Walters*, 821 F.2d 789, 799 (D.C. Cir. 1987) (“However fitful or delayed the release of information under the FOIA may be . . . if we are convinced appellees have, however belatedly, released all nonexempt material, we have no further judicial function to perform under the FOIA.” (quoting *Perry v. Block*, 684 F.2d 121, 125 (D.C. Cir. 1982))); *see Hainey v. United States DOI*, 925 F. Supp. 2d 34, 42 (D.D.C. 2013) (“While the Court agrees that the Department’s responses were untimely under the statute, the Department’s untimely responses, in and of themselves, do not entitle Hainey to judgment in her favor.”); *id.* (“Thus, given that the Department has now responded to Hainey’s request—a fact she does not dispute—the only issue for the Court to consider at this point is whether the Department’s response complies with its obligations under FOIA.”); *Richardson v. Dep’t of Justice*, 730 F. Supp. 2d 225, 231-32 (D.D.C. 2010) (“The timing of an agency’s release of records responsive to a FOIA request does not determine whether the agency has complied with its obligations under the FOIA.”); *see Citizens for a Strong N.H., Inc. v. IRS*, 2015 U.S. Dist. LEXIS 115596, *17 (D.N.H., Aug. 31, 2015) (in a case where a search was finally completed and some documents produced, “[t]he court finds that an agency’s failure to comply with FOIA’s timeliness requirements, alone, does not entitle the requesting party to summary judgment. Rather, such failure merely entitles the requester to seek judicial relief.”).

determination as to whether it will release the requested records” Answer [Doc. #17] ¶ 35 (emphasis added).

5. Moreover, as of the date of this Complaint and up to the current date, “Defendant has failed to produce any records responsive to the request, indicate[] when any responsive records will be produced, or demonstrate[] that responsive records are exempt from production.” Comp. [Doc. 1] ¶ 36. As to this key allegation, “*Defendant admit[ted] that it has not issued a final response to Plaintiff’s FOIA request with any determination as to whether it will release the requested records, but denies all other allegations in this paragraph.*” Answer ¶ 36 (emphasis added). Defendant has exceeded the statutory deadline for making its determination *by over three (3) months*, and has had over four (4) months to make a determination and notify Plaintiff as required.

6. That there is an issue of law ripe for decision is apparent on the face of the parties’ pleadings. *See* Comp. [Doc. # 1] ¶ 42 (“Defendant is unlawfully withholding records requested by Plaintiff pursuant to 5 U.S.C. § 552.”); Answer [Doc. #17] ¶ 42 (“No response is required for paragraph 42 *because it contains a conclusion of law.*” (emphasis added)).

7. As such, Plaintiff respectfully submits its proposed briefing schedule with respect to the Motion for Summary Judgment it intends to file.

II. Defendant’s Statement

Defendant, the U.S. Department of State, submits this status report and proposed schedule in response to the Court’s order of September 12, 2016. The parties have conferred over the phone on September 26, and via email on September 26 and 27.

1. This case involves The American Center for Law and Justice’s (“Plaintiff”) request under the Freedom of Information Act (“FOIA”) seeking records from the U.S.

Department of State regarding a video of a daily press briefing that took place on December 2, 2013. Defendant has identified documents potentially responsive to Plaintiff's FOIA request and is in the process of reviewing those documents to determine the volume of responsive records that will need to be processed. Accordingly, Defendant is unable at this time to state with certainty when it will be able to complete production of responsive, non-exempt records. However, based on the results of its review to date, Defendant anticipates that it will be able to release responsive, non-exempt records to Plaintiff on a rolling basis, with the first production to occur on November 8, 2016, and a final production to occur by December 6, 2016.

2. Because Defendant has not yet completed its response to Plaintiff's FOIA request, Defendant believes that it is premature to propose a schedule for filing dispositive motions. Instead, Defendant proposes that the parties file a status report with the Court by November 18, 2016, updating the Court on the status of Defendant's productions, including its progress towards the anticipated completion of its response by December 6. In addition, Defendant proposes that the parties file an additional status report with the Court after the completion of Defendant's response, indicating whether the parties anticipate filing any motions for which the Court must enter a briefing schedule.

Dated: September 27, 2016.

BENJAMIN MIZER
Principal Deputy Assistant Attorney General

MARCIA BERMAN
Assistant Branch Director,
Federal Programs Branch

/s/ Deepthy Kishore
DEEPTHY KISHORE
Trial Attorney [REDACTED]
United States Department of Justice

Respectfully submitted,

/s/ Jay Alan Sekulow
JAY ALAN SEKULOW
[REDACTED]
COUNSEL OF RECORD
STUART J. ROTH [REDACTED]
COLBY M. MAY [REDACTED]
CRAIG L. PARSHALL
BENJAMIN P. SISNEY*
THE AMERICAN CENTER FOR LAW AND JUSTICE
[REDACTED]

*Admitted *Pro Hac Vice*.

Civil Division, Federal Programs Branch

[REDACTED]

[REDACTED]

Counsel for Plaintiff

Mailing Address:

[REDACTED]

Courier Address:

[REDACTED]

Counsel for Defendant