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17
18 UNITED STATES DISTRICT COURT
19 SOUTHERN DISTRICT OF CALIFORNIA
20

21 THE CHILDREN'S ADVOCACY
INSTITUTE,
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Plaintiff,
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v.
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25 OFFICE OF REFUGEE
RESETTLEMENT,
26 ADMINISTRATION FOR CHILDREN
AND FAMILIES, United States
Department of Health and Human
27 Services; UNITED STATES
IMMIGRATION AND CUSTOMS
28 ENFORCEMENT, United States

Case No. 19cv462 GPC (BGS)
**JOINT EARLY NEUTRAL
EVALUATION STATEMENT**

1 Department of Homeland Security;
2 UNITED STATES CUSTOMS AND
3 BORDER PROTECTION, United
4 States Department of Homeland
5 Security; UNITED STATES
6 DEPARTMENT OF HOMELAND
7 SECURITY.

8 Defendants.

9 Plaintiff and Defendants submit this Joint Early Neutral Evaluation Statement in
10 advance of the ENE set for August 26, 2019.

11 I. NATURE OF THE CASE

12 Plaintiff asserts claims against Defendants for alleged violation of the Freedom of
13 Information Act (FOIA), 5 U.S.C. § 552. The FOIA provides for public release of
14 government information, both through proactive disclosures and in response to specific
15 requests. Although the statute generally provides for release of requested documents, it
16 also lists nine categories of information that are exempt from release. 5 U.S.C. § 552(b)(1)-
17 (9). Under the statute, an agency must respond to the FOIA request within twenty business
18 days. 5 U.S.C. § 552 (a)(6)(A)(I). When an agency is unable to comply within this
19 timeframe, the requester is deemed to have exhausted administrative remedies. 5 U.S.C. §
20 552(a)(6)(C)(i). Disputes in FOIA cases – such as disputes over the thoroughness of the
21 agency’s search and over its withholding of exempt documents – are “typically and
22 appropriately” resolved on summary judgment. *Harrison v. Exec. Ofc. for U.S. Atty’s*, 377
23 F. Supp. 2d 141, 145 (D.D.C. 2005).

24 To prevail on a FOIA claim, the requestor must show that “an agency has (1)
25 improperly (2) withheld (3) agency records.” *Green v. Nat’l Archives & Records Admin.*,
26 992 F. Supp. 811, 817 (E.D. Va. 1998) (citing *Kissinger v. Rptr. Comm. for Freedom of*
27 *the Press*, 445 U.S. 136, 150 (1980)). “Absent such a showing, a district court lacks
28 jurisdiction to devise remedies to force an agency to comply with FOIA’s disclosure
requirements.” *Green*, 992 F. Supp. at 817 (citing *U.S. Dep’t of Justice v. Tax Analysts*,

1 492 U.S. 136, 142 (1989)).

2 On June 20, 2018, Plaintiff submitted three separate but substantively identical
3 FOIA requests to the United States Department of Health and Human Services,
4 Administration for Children and Families (HHS), Immigration and Customs Enforcement
5 (ICE), and United States Customs and Border Protection (CBP) (collectively “Defendants”
6 or individually, a “Defendant”). Exhibits 1-3.

7 **II. CLAIMS**

8 Plaintiff contends Defendants have violated FOIA by failing to produce records
9 responsive to Exhibits 1-3. The FOIA requests were served on each of the Defendant
10 agencies on June 20, 2018. Nine months later, HHS had not responded to Plaintiff’s FOIA
11 request, and neither ICE nor CBP had produced any responsive records, forcing Plaintiff
12 to bring this lawsuit to obtain compliance with FOIA. On July 11, 2019, Plaintiff and
13 Defendants met and conferred to determine whether and when Defendants would provide
14 further records in response to the FOIA requests. This marked the first time that HHS
15 provided Plaintiff with any information regarding the FOIA request served on it. Plaintiff
16 understands that Defendants are now in the process of producing what is purported to be
17 an initial set of responsive records. Despite having received the underlying FOIA requests
18 more than one year ago, Defendants have yet to produce a single responsive record.
19 Defendants have also not identified any statutory exemptions that prevent the release of
20 any category of requested documents.

21 Nevertheless, Plaintiff continues to work with Defendants to facilitate production of
22 the requested records, reserving all rights to the legal remedies available to it including the
23 right to conduct discovery into Defendants’ efforts to comply with the underlying FOIA
24 requests. Plaintiff simply seeks the responsive records as soon as possible, and is open to
25 any means the government or the Court proposes to streamline this process and minimize
26 inconvenience, so long as Defendants comply with FOIA.

27 **III. DEFENSES**

28 **A. HHS**

1 The Administration for Children and Families within HHS does not maintain records
2 responsive to Paragraph 1 (regarding adults detained or arrested). Paragraphs 2-3 and 7 of
3 the FOIA request (seeking documents and/or databases of minors detained and specific
4 data points for each minor including language spoken, country of origin, age, medical
5 condition, legal representation, relatives, etc.) list broad categories of information that
6 would be unduly burdensome for the agency to identify and gather records responsive to
7 each subcategory as the request is stated. The information requested in the FOIA request
8 does not correspond to the organization of the agency's file systems. Some of the
9 information requested is not reliably included in any specific database, but may be
10 incidentally included on an ad hoc basis, further complicating a search.

11 Defendant has engaged in efforts to clarify the scope of the request with the
12 requester. To that end, the agency identified a subpoena, issued to the HHS Secretary by
13 the House Committee on Oversight and Reform, which substantially overlaps with these
14 portions of the plaintiff's FOIA request. Defendant provided a copy of that subpoena and
15 a sample of the record types that are being produced in response to the subpoena, to
16 Plaintiff. The records as processed in response to the subpoena generally include the
17 following information from individual case files:

- 18 • Date of birth
- 19 • Gender
- 20 • County of origin
- 21 • ORR status (e.g., "discharged")
- 22 • ORR program
- 23 • Admitted date
- 24 • Discharge date
- 25 • Discharge type (e.g., "reunified")
- 26 • Case coordinator notes
- 27 • ORR release decision

28 Defendant has inquired whether Plaintiff would accept the records produced in
response to the subpoena in satisfaction of Paragraphs 2 and 3 of its request. If so, the
agency would be able to process those records for release considerably faster.

1 With regards to paragraphs 4-6 and 8 seeking policy materials, the agency is
2 conducting a separate search, which is ongoing.

3 Plaintiffs have asked for further information regarding the relevant database, as well
4 as whether any information is aggregated in other forms. The agency is working on
5 responding to Plaintiff's questions.

6 **B. ICE**

7 ICE does not maintain records responsive to Paragraphs 1 through 6. ICE has
8 completed a search for records potentially responsive to Paragraph 7 (documents showing
9 number of requests for reunification). There are a little less than 700 pages identified. ICE
10 proposes a rolling response as follows: (1) by August 9th ICE will process 350 pages and
11 produce any non-exempt records; and (2) by September 9th ICE will process the remaining
12 pages and produce any non-exempt records. In the meantime, Plaintiff has asked for
13 generalized information regarding the kinds of records identified as responsive. The
14 agency is working on responding to Plaintiff's question.

15 With regards to Paragraph 8 (policies), on September 25, 2018, Defendant ICE
16 produced 22 pages of records in response to the Request. Plaintiff appealed the ICE FOIA
17 Office's response on October 30, 2018. On December 12, 2018, ICE adjudicated the
18 appeal and remanded it back to the ICE FOIA Office to search for and process records
19 responsive to Paragraph 7 of the request, should they exist.

20 **C. CBP**

21 On August 2, 2018, CBP requested that Plaintiff narrow its request. On August
22 13, 2018, Plaintiff submitted a narrower amended request. CBP asserts the same undue
23 burdensome argument identified by HHS and also seek clarification regarding the request.
24 With regards to Paragraphs 1-3, the agency has inquired whether the requestor is seeking
25 all arrest report or statistical information (much of which is publically available on the
26 agency's website). The agency has also provided a sample of an arrest report to Plaintiff.
27 With regards to paragraphs 4-6 and 8 (regarding policies), the Agency provided the link to
28 the publically available TEDS policy (CBP National Standards on Transport, Escort,

1 Detention, and Search). Plaintiff has asked for information regarding Paragraph 7. The
2 agency is working on responding to Plaintiff's question.

3 **IV. SETTLEMENT AND NEGOTIATIONS**

4 The parties have engaged in ongoing discussions beginning with a meeting of
5 counsel on May 28, 2019. On July 11, 2019, counsel for both parties, including
6 Defendants' agency counsel, conducted a further meet and confer session regarding the
7 Plaintiff's requests. The parties have also been corresponding via email and Defendant has
8 provided sample records and publically available information to Plaintiff. Defendants are
9 also working on providing answers to Plaintiff's questions to facilitate processing of these
10 requests.

11 There have been no prior settlement demands or offers. The processing of the FOIA
12 requests must be completed before the parties will be in a position to make settlement
13 demands and responses.

14 **V. CONCLUSION**

15 The parties have been effectively meeting and conferring and are committed to
16 continuing those efforts. The parties welcome the Court's assistance in this complex FOIA
17 matter.

18 DATED: August 5, 2019

Respectfully submitted,

19
20 ROBERT S. BREWER, JR.
United States Attorney

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22 REBECCA G. CHURCH
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24 and

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27
28 *s/ Travis J. Anderson*
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THE CHILDREN’S ADVOCACY
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CERTIFICATION

Pursuant to Section 2(f)(4) of the Electronic Case Filing Administrative Policies and Procedures of the United States District Court for the Southern District of California, I certify that the content of this document is acceptable to Travis J. Anderson, Esq. and that I have obtained authorization from him to affix his electronic signatures to this document.

By: s/ Rebecca G. Church
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