

JOSEPH P. RUSSONIELLO, CSBN 44332
United States Attorney
JOANN M. SWANSON, CSBN 88143
Assistant United States Attorney
Chief, Civil Division
ILA C. DEISS, NY SBN 3052909
Assistant United States Attorney

450 Golden Gate Avenue, Box 36055
San Francisco, California 94102
Telephone: (415) 436-7124
FAX: (415) 436-7169

Attorneys for Defendants

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

MIRSAD HAJRO, JAMES R. MAYOCK,

Plaintiffs,

v.

UNITED STATES CITIZENSHIP AND
IMMIGRATION SERVICES;
T. DIANE CEJKA, Director,
USCIS National Records Center;
ROSEMARY MELVILLE, USCIS District
Director of San Francisco;
MICHAEL CHERTOFF, Secretary,
Department of Homeland Security;
ERIC HOLDER, Attorney General
Department of Justice,

Defendants.

No. C 08-1350 PVT

**DEFENDANTS' NOTICE AND
MOTION FOR SUMMARY
JUDGMENT; AND MEMORANDUM
OF POINTS AND AUTHORITIES;
AND DECLARATIONS OF JILL A.
EGGLESTON, RONALD NELSON
AND ILA C. DEISS**

Hearing Date: October 13, 2009
Time: 10:00 a.m.

TABLE OF CONTENTS

1		
2	MEMORANDUM OF POINTS AND AUTHORITIES.....	1
3	I. INTRODUCTION.....	1
4	II. FACTS.....	1
5	A. Plaintiff Mirsad Hajro.	1
6	B. Plaintiff Mayock and The Mayock Settlement Agreement.	3
7	C. USCIS’ “Track III” FOIA Processing Policy.....	3
8	III. LEGAL STANDARDS.....	3
9	IV. ARGUMENT.	4
10	A. All FOIA Claims Against Government Defendants Other Than the USCIS Should be	
11	Dismissed for Lack of Jurisdiction.	4
12	B. The Court Should Dismiss Defendant Holder.	5
13	C. Plaintiff Mayock Lacks Standing and Should Be Dismissed..	5
14	D. Plaintiffs’ Second, Third and Fourth Causes of Action Should Be Dismissed as Moot	
15	Because USCIS Has Produced all of the Requested Nonexempt Records to	
16	Plaintiff Hajro.	6
17	E. Summary Judgment Should Be Entered in Defendants’ Favor on the Sixth and Seventh	
18	Causes of Action Because USCIS is Lawfully Withholding Records Under the	
19	Articulated FOIA Exemptions.....	8
20	F. Summary Judgment Should Be Granted in Defendants’ Favor on Plaintiffs’ Fifth Cause	
21	of Action Because Plaintiffs Have Failed to Establish a Pattern and Practice..	9
22	G. Plaintiffs’ First and Second Causes of Action Should be Dismissed Because the 1992	
23	Settlement Agreement was Superseded By Statute in 1996.....	10
24	H. Summary Judgment Should be Granted in Defendants’ Favor on Cause of Action Nine	
25	because USCIS’s “Tract Three” FOIA Processing Policy is Exempt from The Notice and	
26	Comment Requirements Set Forth in the APA.	13
27	V. CONCLUSION.	15
28		

TABLE OF AUTHORITIES

FEDERAL CASES

<u>Al-Fayed v. Central Intelligence Agency,</u>	
254 F.3d 300 (D.C. Cir. 2001).....	11, 12
<u>Anderson v. Liberty Lobby, Inc.,</u>	
477 U.S. 242 (1986).....	3
<u>Batterton v. Marshall,</u>	
648 F.2d 694 (D.C.Cir.1980).....	15
<u>Black Construction Corp. v. Immigration and Naturalization Serv.,</u>	
746 F.2d 503 (9th Cir. 1984).	4
<u>Bowen v. Massachusetts,</u>	
487 U.S. 879 (1988).....	13
<u>Califano v. Sanders,</u>	
430 U.S. 99 (1977).....	8
<u>Celotex Corp. v. Catrett,</u>	
477 U.S. 317 (1986).....	3
<u>Chamber of Commerce of U.S. v. U.S. Dept. of Labor,</u>	
174 F.3d 206 (D.C. Cir. 1999).....	14
<u>Church of Scientology v. U.S. Dep’t of Army,</u>	
611 F.2d 738 (9th Cir. 1979).....	8
<u>Commonwealth of Pennsylvania v. United States,</u>	
361 F. Supp. 208 (M.D. Pa. 1973),.	14
<u>EPA v. Mink,</u>	
410 U.S. 73 (1973).....	10
<u>Erringer v. Thompson,</u>	
371 F.3d 625 (9th Cir. 2004).	14
<u>Gilmore v. U.S. Dept. of Energy,</u>	
33 F. Supp. 2d 1184 (N.D. Cal. 1998).....	6
<u>Goland v. CIA,</u>	
607 F.2d 339 (D.C. Cir. 1978).....	9
<u>Inova Alexandria Hosp. v. Shalala,</u>	
244 F.3d 342 (4th Cir. 2001).	15
<u>Jang v. Reno,</u>	
113 F.3d 1074 (9th Cir. 1997).	4
<u>Kousar v. Mueller,</u>	
549 F. Supp. 2d 1194 (N.D. Cal. 2008).....	5

1	<u>Lawrence v. Comm’r of Internal Revenue,</u>	
2	2000 WL 637351 (C.D. Cal. Mar. 2, 2000).....	4
3	<u>Lion Raisins v. U.S. Dept. of Agriculture,</u>	
4	354 F.3d 1074 (9 th Cir. 2004).....	8
5	<u>Liverman v. Office of the Inspector Gen.,</u>	
6	139 Fed. Appx. 942, 944 (10 th Cir. 2005).....	6
7	<u>Lujan v. Defenders of Wildlife,</u>	
8	504 U.S. 555 (1992).....	5
9	<u>Mayock v. I.N.S.,</u>	
10	714 F. Supp. 1558 (N.D. Cal. 1989).	3
11	<u>Mayock v. Nelson,</u>	
12	938 F.2d 1006 (9 th Cir. 1991).....	3, 6, 9
13	<u>Open America v. Watergate Special Prosecution Force,</u>	
14	547 F.2d 605 (D.C. Cir. 1976).....	10
15	<u>Papa v. United States,</u>	
16	281 F.3d 1004, 1013 (9 th Cir. 2002).....	7
17	<u>Payne Enters., Inc. v. United States,</u>	
18	837 F.2d 486 (D.C. Cir. 1988).....	6
19	<u>Pennsylvania v. U. S.,</u>	
20	414 U.S. 1017 (1973).	14
21	<u>Perry v. Block,</u>	
22	684 F.2d 121 (D.C. Cir. 1982).....	4
23	<u>Petrus v. Bowen,</u>	
24	833 F.2d 581 (5 th Cir. 1987).	4
25	<u>Rivera v. Becerra,</u>	
26	714 F.2d 887, 890-91 (9 th Cir.1983).....	15
27	<u>Schiffer v. FBI,</u>	
28	78 F.3d 1405 (9 th Cir. 1996).....	4
	<u>Southern California Edison Co. v. F.E.R.C.,</u>	
	770 F.2d 779 (9 th Cir. 1985).....	13, 15
	<u>Steinberg v. U.S. Dep’t of Justice,</u>	
	23 F.3d 548 (D.C. Cir. 1994).....	3
	<u>Thomas Jefferson Univ. v. Shalala,</u>	
	512 U.S. 504 (1994).....	4
	<u>Thompson v. Walbran,</u>	
	990 F.2d 403 (8 th Cir. 1993).	4

1	<u>Tucson Airport Authority v. General Dynamics Corp.,</u>	
2	136 F.3d 641 (9th Cir. 1988).	8
3	<u>Wheeler v. U.S. Dep't of Justice,</u>	
4	462 F. Supp. 2d 48 (D.D.C. 2006).	10
5	<u>Yonemoto v. Dep't of Veteran Affairs,</u>	
6	305 F. App'x 333, 334 (9th Cir. 2008).	7
7	<u>Zemansky v. EPA,</u>	
8	767 F.2d 569 (9th Cir.1985).	7

FEDERAL STATUTES

10	6 C.F.R. § 5.5(d).	2, 10, 12, 13
11	5 U.S.C. § 552(a)(6)(e)(v).	2, 4, 7, 8, 9, 11, 12
12	5 U.S.C. § 553.	13, 14
13	5 U.S.C. § 703	5, 13
14	5 U.S.C. § 704	13
15	5 U.S.C.A. § 706.	4, 5
16	28 U.S.C. § 2201, 2202.	1
17	Fed. R. Civ. P. 56.	1, 3

1 **PLEASE TAKE NOTICE** that, pursuant to stipulation dated August 3, 2009, the federal
 2 Defendants will move this Court on **October 13, 2009 at 10:00 a.m.** in Courtroom 5, United
 3 States Federal Building, 280 S. First Street, San Jose, California, before the Honorable Patricia V.
 4 Trumbull, U.S. Magistrate Judge, for summary judgment of Plaintiffs' First Amended Complaint
 5 (Am. Compl.) pursuant to Fed. R. Civ. P. 56.

6 This motion is based on this notice, the memorandum of points and authorities, the Declarations
 7 of Jill Eggleston (Eggleston Decl.), attached hereto as Exhibit A, Ronald Nelson (Nelson Decl.),
 8 attached hereto as Exhibit B, and Ila C. Deiss (Deiss Decl.), attached hereto as Exhibit C, all the
 9 matters of record filed with the Court, and such other evidence as may be submitted.

10 **MEMORANDUM OF POINTS AND AUTHORITIES**

11 **I. INTRODUCTION**

12 In their June 2008 First Amended Complaint, Plaintiffs bring nine causes of action against
 13 Defendants seeking relief under the Freedom of Information Act (FOIA) and the Administrative
 14 Procedure Act (APA).¹ Am. Compl., ¶¶ 58-76. Plaintiffs' claims can be generally divided into
 15 those that ask this Court to "order production of agency records related to Plaintiff Hajro" and
 16 allege various violations of the FOIA, Am. Compl., Second, Third, Fourth, Fifth, Sixth, and
 17 Seventh Causes of Action, and those that challenge the U.S. Citizenship and Immigration
 18 Services' (USCIS) "Track III" policy of processing certain FOIA requests. Am. Compl., First,
 19 Eighth, and Ninth Causes of Action. Defendants hereby move for summary judgment of the First
 20 Amended Complaint in its entirety because there are no material facts in dispute and Defendants
 21 are entitled to a judgment as a matter of law.

22 **II. FACTS**

23 **A. Plaintiff Mirsad Hajro.**

24 Plaintiff Hajro is a legal permanent resident who applied for naturalization in 2003, and was
 25 denied in 2007. Am Compl., ¶¶ 31-39; Nelson Decl., ¶¶ 3-6. On November 7, 2007, Plaintiff

27 ¹Plaintiffs also invoke the Declaratory Judgment Act, 28 U.S.C. § 2201, 2202. Am
 28 Compl., ¶ 10.

1 Hajro made an expedited request under the FOIA with the Department of Homeland Security
2 (DHS), USCIS requesting a copy of his alien registration file, which at the time was still with
3 USCIS's San Francisco Field Office. Am Compl., ¶¶ 3, 40-42; Eggleston Decl., ¶¶ 5, 7; Nelson
4 Decl. ¶ 7.

5 On November 19, 2007, Defendant USCIS denied Plaintiff Hajro's request for expedited
6 processing because "it did not satisfy the criteria set forth for such consideration under the FOIA,
7 5 U.S.C. § 552(a)(6)(e)(v), and DHS's implementing regulation found at 6 C.F.R. § 5.5(d)." Am.
8 Compl., ¶¶ 44-45; Eggleston Decl., ¶ 6. Plaintiff Hajro was also advised that the FOIA request
9 would be processed in the Track II, complex track, and would require more than 20 days to
10 process. Am. Compl., ¶¶ 20, 45-46; Eggleston Decl., ¶ 6. On or about November 20, 2007, the
11 National Records Center requested delivery of Hajro's complete alien registration file and
12 associated records from USCIS's San Francisco District Office. Eggleston Decl., ¶ 7.
13 Plaintiff Hajro appealed the denial of his expedited processing request, and on March 21, 2008,
14 his administrative appeal was denied as the agency determined that Hajro "had not demonstrated
15 that his request warranted expedited treatment pursuant to the standard set by 6 C.F.R. § 5.5(d)." Eggleston
16 Decl., ¶¶ 8-9. Meanwhile, on March 4, 2008, USCIS sent out the responsive,
17 nonexempt, reasonably segregable portions of his alien file to Hajro. Am. Compl., ¶¶ 50-51;
18 Eggleston Decl., ¶ 9-11. USCIS's FOIA determination provided for the release of 356 pages of
19 responsive documents in full and eight pages in part; 78 pages were withheld in full. Eggleston
20 Decl. ¶ 11; Deiss Decl., Exhibit 1.

21 On May 12, 2008, Plaintiff Hajro administratively appealed the FOIA response. Am.
22 Complaint, ¶ 52. On May 13, 2008, Plaintiff Hajro filed a brief in his administrative appeal of the
23 denial of his naturalization application. Am. Compl., ¶ 55; Nelson Decl., ¶ 11. On July 31, 2008,
24 USCIS released an additional 12 pages of documents of additional the 13 found to be responsive
25 to Hajro's FOIA request. Eggleston Decl., ¶ 13. In December 2008, Hajro was given a Vaughn
26 Index to explain USCIS's withholdings. Deiss Decl., Exhibit 1.
27 On October 16, 2008, Hajro appeared for a *de novo* hearing on his denied application for
28 naturalization. Nelson Decl., ¶ 12. On November 26, 2008, USCIS determined that Hajro was

not eligible for naturalization and his application remained denied. Nelson Decl., ¶ 13.

B. Plaintiff Mayock and The Mayock Settlement Agreement.

Plaintiff James R. Mayock is an immigration attorney in San Francisco. Am Compl., ¶ 2. Plaintiff Mayock was the plaintiff in Mayock v. I.N.S., 714 F. Supp 1558 (N.D. Cal. 1989), *rev'd and remanded sub nom.* Mayock v. Nelson, 938 F.2d 1006 (9th Cir. 1991). Am Compl., ¶ 17. As a result of the litigation in that case, Plaintiff Mayock entered into a Settlement Agreement with the former Immigration and Naturalization Service (INS). Am Compl., ¶ 18; Exh. A (hereinafter referred to as “the 1992 Settlement Agreement” or “the Settlement Agreement”). Under the 1992 Settlement Agreement, there is a provision for “Expedited Processing for Demonstrated Exceptional Need or Urgency” of FOIA requests and “Procedures for Expedited Processing.” Am Compl., ¶ 19.

C. USCIS’s “Track III” FOIA Processing Policy.

USCIS uses a multi-track system for responding to FOIA requests: Track I are simple requests that can be processed in under 20 days; Track II are complex cases that require more than 20 days to process; and Track III was implemented on February 28, 2007, to expedite cases for individuals who are in removal proceedings and have a scheduled hearing before an immigration judge. Am. Compl., ¶¶ 20-22; Exh. C.

III. LEGAL STANDARDS

The court may grant summary judgment when there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; see Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). In resolving a motion for summary judgment, all reasonable inferences that may be gleaned from the facts before the court must be construed in favor of the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

To satisfy this standard in a FOIA case, an agency must show, viewing the facts in the light most favorable to the requester, that there is no genuine issue of material fact with regard to the agency’s compliance with the FOIA. Steinberg v. U.S. Dep’t of Justice, 23 F.3d 548, 551 (D.C. Cir. 1994) (citation omitted). In order to satisfy this standard, “the defending agency must prove

1 that each document that falls within the class requested either has been produced, is
 2 unidentifiable, or is wholly exempt from the FOIA's inspection requirements." Perry v. Block,
 3 684 F.2d 121, 126 (D.C. Cir. 1982) (citation omitted). As is the case here, "there is rarely any
 4 factual dispute . . . only a legal dispute over how the law is to be applied to the documents at
 5 issue." Schiffer v. FBI, 78 F.3d 1405, 1409 (9th Cir. 1996).

6 Under the APA, the general standard of review of an administrative decision is whether the
 7 decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.
 8 See 5 U.S.C. § 706(2)(A). Judicial review of agency action is limited to review of the
 9 administrative record, see Black Construction Corp. v. Immigration and Naturalization Serv., 746
 10 F.2d 503, 505 (9th Cir. 1984), and is entitled to substantial deference, see Thomas Jefferson Univ.
 11 v. Shalala, 512 U.S. 504, 512 (1994). Where the issue concerns interpretation by a federal agency
 12 of a statute and the agency's regulations, which the agency administers and enforces and where
 13 Congress has expressed no intent on the precise question, the court's review is deferential and
 14 circumscribed. See Thomas Jefferson, supra, 512 U.S. at 512; Jang v. Reno, 113 F.3d 1074, 1076
 15 (9th Cir. 1997).

16 **IV. ARGUMENT**

17 **A. All FOIA Claims Against Government Defendants Other Than the USCIS Should be** 18 **Dismissed for Lack of Jurisdiction.**

19 In actions arising under FOIA, the only proper defendants are federal departments and agencies.
 20 See 5 U.S.C. § 552(a); Lawrence v. Comm'r of Internal Revenue, 2000 WL 637351, at *1 (C.D.
 21 Cal. Mar. 2, 2000) (citing Thompson v. Walbran, 990 F.2d 403, 405 (8th Cir. 1993); Petrus v.
 22 Bowen, 833 F.2d 581, 582 (5th Cir. 1987)). "Individual officers of federal agencies are not proper
 23 parties to a FOIA action." Lawrence, 2000 WL 637351, at *1.

24 USCIS is a component of DHS, a federal agency, and is therefore a proper Defendant for
 25 Plaintiffs' FOIA claims. See 5 U.S.C. § 552. Further, USCIS implemented the Track III FOIA
 26 processing policy Plaintiffs challenge. The remaining Defendants are officers of USCIS or are the
 27 Attorney General of the United States and are not proper Defendants. See Lawrence, 2000 WL
 28 637351, at *1. The court therefore should dismiss all of Plaintiffs' FOIA claims against all

1 Defendants except USCIS.

2 **B. The Court Should Dismiss Defendant Holder.**

3 The proper defendant in an APA action is the government agency that took the action for
 4 which review is sought, or the appropriate officer of such agency. See 5 U.S.C. § 703. Therefore,
 5 because the DHS, and its component USCIS, not the U.S. Department of Justice, is the agency
 6 responsible for implementing the Immigration and Nationality Act, and the agency to process
 7 Plaintiff Hajro's FOIA request. Defendant U.S. Attorney General Holder should be dismissed
 8 from this action. 5 U.S.C.A. § 706; Homeland Security Act of 2002, §§ 451(b)(5); see also
 9 Kousar v. Mueller, 549 F. Supp.2d 1194, 1197 (N.D. Cal. 2008).

10 **C. Plaintiff Mayock Lacks Standing and Should Be Dismissed.**

11 Under the FOIA, if the agency refuses the request and denies the requester's administrative
 12 appeal, § 552(a)(4)(B) authorizes district courts, "on complaint, to enjoin the agency from
 13 withholding agency records and to order the production of any agency records improperly
 14 withheld *from the complainant*." (Emphasis added.) Here, Plaintiff Mayock is not a requester and
 15 no agency records have been withheld from him. Therefore, he lacks standing to bring this action
 16 under the FOIA.

17 Further, the Supreme Court has established that the minimum constitutional requirements for
 18 standing are: (1) the plaintiff must have suffered an injury in fact-an invasion of a legally
 19 protected interest which is (a) concrete and particularized and (b) actual or imminent, not
 20 conjectural or hypothetical; (2) there must be a causal connection between the injury and the
 21 conduct complained of-the injury has to be fairly traceable to the challenged action of the
 22 defendant, and not the result of the independent action of some third party not before the court;
 23 and (3) it must be likely, as opposed to speculative, that the injury will be redressed by a favorable
 24 decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). The party invoking
 25 federal jurisdiction bears the burden of establishing standing. Id. at 561.

26 Plaintiff Mayock has suffered no injury-in fact by any alleged withholding or delay in
 27 processing of Plaintiff Hajro's FOIA request. He has suffered no injury-in fact relating to an
 28 alleged breach of the 1992 Settlement Agreement. There is no evidence that Plaintiff Mayock has

1 been affected in any way by DHS' processing of Plaintiff Hajro's FOIA request.

2 It is true that a plaintiff may bring an independent claim alleging "a pattern and practice of
3 unreasonable delay in responding to FOIA requests." Liverman v. Office of the Inspector Gen.,
4 139 Fed. Appx. 942, 944 (10th Cir. 2005); see also Payne Enters., Inc. v. United States, 837 F.2d
5 486, 494 (D.C. Cir. 1988). The plaintiff, however, still needs to be the requester and establish an
6 injury or standing requirements would be improperly circumvented. Being an immigration
7 attorney who has made at some time of over the years several FOIA requests on behalf of his
8 clients, Am Compl., ¶16, is insufficient to establish standing here.²
9 Plaintiff Mayock has not established standing to bring any part of this action and should be
10 dismissed as a Plaintiff.

11 **D. Plaintiffs' Second, Third and Fourth Causes of Action Should Be Dismissed as Moot**
12 **Because USCIS Has Produced of all the Requested Nonexempt Records to Plaintiff**
13 **Hajro.**

14 Plaintiffs challenge the denial of Plaintiff Hajro's expedited processing request. Am. Compl.,
15 Second Cause of Action. Plaintiffs assert that USCIS's failure to provide Plaintiff Hajro with the
16 requested material within 20 days violated the FOIA. Am. Compl., Third Cause of Action.
17 Plaintiffs argue that failure to provide Plaintiff Hajro "unusual circumstances" for taking more
18 than 20 days to process the FOIA request violated the agency's regulations. Am. Compl., Fourth
19 Cause of Action.

20 To the extent Plaintiff Hajro is challenging the timeliness of USCIS's FOIA responses, those
21 claims should be dismissed as barred by the statute or as moot.

22 This Court cannot review Plaintiffs' challenge the denial of Plaintiff Hajro's expedited
23 processing request. FOIA specifically provides that "a district court ... shall not have jurisdiction
24

25 ²Defendants recognize that previously Plaintiff Mayock was found to have standing to
26 challenge the former INS' failure to timely respond to his clients' FOIA requests. Mayock v.
27 Nelson, 938 F.2d 1006, 1007 n. 1 (9th Cir. 1991). Plaintiff Mayock makes no similar allegation
28 here and is neither the requestor or Plaintiff Hajro's attorney. See also Gilmore v. U.S. Dept. of
Energy, 33 F. Supp. 2d 1184 (N.D. Cal. 1998) (plaintiff had standing to bring a "pattern or
requests) (emphasis added).

1 to review an agency denial of expedited processing of a request for records after the agency has
 2 filed a complete response to the request.” 5 U.S.C. § 552(a)(6)(E)(iv).³

3 Here, Plaintiff Hajro’s responsive alien file was prepared for disclosure, approved, transferred
 4 to CD, mailed to Plaintiff Hajro and closed by March 4, 2008. Eggleston Decl., ¶ 11. All
 5 reasonably segregable nonexempt responsive records known to exist were considered and
 6 prepared for release. Another review was conducted on July 31, 2008, with the disclosure of 13
 7 additional pages of responsive documents, 12 pages of which were released in full. Eggleston
 8 Decl., ¶ 13. Plaintiff Hajro does not appear to challenge either the adequacy of the search for
 9 responsive documents conducted by or its reliance upon FOIA exemptions to withhold some
 10 documents from Plaintiff Hajro’s alien file.⁴ USCIS’s response to Plaintiff Hajro’s FOIA requests
 11 was adequate, see Zemansky v. EPA, 767 F.2d 569, 571 (9th Cir.1985) (“In demonstrating the
 12 adequacy of the search, the agency may rely upon reasonably detailed, nonconclusory affidavits
 13 submitted in good faith.”), and the delay, if any, was not due to bad faith. Therefore, the FOIA
 14 claims should be dismissed. See Papa v. United States, 281 F.3d 1004, 1013 (9th Cir. 2002)
 15 (recognizing that the production of all nonexempt documents, “however belatedly,” moots a FOIA
 16 claim) (internal quotation marks omitted); Yonemoto v. Dep’t of Veteran Affairs, 305 F. App’x

18 ³As an aside, Plaintiff Hajro received the FOIA response three months before submitting
 19 his administrative appellate brief supporting his appeal from the denial of his naturalization
 20 application. Eggleston Decl., ¶ 11; Nelson Decl., ¶ 11. He received an additional disclosure of
 21 12 pages in full in July 2008, prior to his *de novo* hearing on the denial of his application for
 22 naturalization in October 2008. Eggleston Decl., ¶ 13; Nelson Decl., ¶ 12.

23 ⁴Plaintiffs’ state that they want to see the interviewing notes of officer that interviewed
 24 Plaintiff Hajro during his naturalization application. See Am. Complaint, ¶ 52. Plaintiff further
 25 state that they did not “insist on the releasing of all withheld material.” Id. Plaintiff Hajro was
 26 provided a Vaughn Index, see Deiss Decl., doc 386, in which the interviewing notes are stated to
 27 have been withheld as part of the deliberative process regarding the adjudication of the
 28 application for naturalization under 5 U.S.C. § 552(b)(5) and as law enforcement under 5 U.S.C.
 § 552(b)(7)(C). The notes were embodied in the denial decision issued on October 9, 2007. Am.
 Compl., Exh G. And again after the administrative appeal process on November 26, 2008.
 Nelson Decl., ¶ 13. Defendants will address this further once specific challenges are raised, if at
 all.

333, 334 (9th Cir. 2008) (same).

Therefore, Plaintiffs' Second, Third and Fourth Causes of Action should be dismissed and judgment entered in Defendants' favor.

E. Summary Judgment Should Be Entered in Defendants' Favor on the Sixth and Seventh Causes of Action Because USCIS is Lawfully Withholding Records Under the Articulated FOIA Exemptions.

Those portions of Plaintiffs' Sixth Cause of action that assert the withholdings violate the APA should be dismissed because FOIA provides an adequate remedy. See Tucson Airport Authority v. General Dynamics Corp., 136 F.3d 641, 645 (9th Cir. 1988), citing Califano v. Sanders, 430 U.S. 99, 105 (1977) (The APA's waiver of sovereign immunity does not apply unless an adequate remedy is unavailable elsewhere).

Plaintiffs claim that the withheld material from Plaintiff Hajro's alien file "is not exempt from disclosure under the [FOIA]." Am. Compl., Sixth Cause of Action, ¶ 71. In cases "[w]here the government withholds documents pursuant to one of the enumerated exemptions of FOIA 'the burden is on the agency to sustain its action.'" Lion Raisins v. Dep't of Agriculture, 354 F.3d 1074, 1079 (9th Cir. 2004) (citing 5 U.S.C. § 552(a)(4)(B)). "If the agency supplies a reasonably detailed affidavit describing the document[s] [withheld] and facts sufficient to establish an exemption, then the district court need look no further in determining whether an exemption applies." Church of Scientology v. U.S. Dep't of Army, 611 F.2d 738, 742 (9th Cir. 1979). Ordinarily, the agency affidavit(s) identify the document(s) withheld, specify the FOIA exemption(s) claimed, and explain why each document falls within a claimed exemption. Lion Raisins, 354 F.3d at 1082. This submission is typically referred to as a Vaughn index. Id. The affidavit(s) "must be detailed enough for the district court to make a de novo assessment of the government's claim of exemption." Id. (internal quotation marks omitted).

Plaintiff Hajro was given an additional 12 pages of documents after the First Amended Complaint was filed. Further, as discussed above in footnote 4, it is not entirely clear what exemption Plaintiffs are challenging and what documents specifically are Plaintiffs stating are being unlawfully withheld. At this point, Defendants have provided Plaintiffs with a detailed declaration and a Vaughn Index describing the documents withheld and the exemptions applied

1 and are in compliance with the FOIA.

2 Therefore, summary judgment should be granted in Defendants' favor on the Sixth and
3 Seventh Causes of Action.

4 **F. Summary Judgment Should Be Granted in Defendants' Favor on Plaintiffs' Fifth**
5 **Cause of Action Because Plaintiffs Have Failed to Establish a Pattern and Practice.**

6 Plaintiffs argue that Defendants have a pattern or practice of failing to comply with the
7 time requirements of the FOIA. Am. Compl. Fifth Cause of Action.

8 Defendants recognize that a plaintiff may bring an independent claim alleging "a pattern and
9 practice of unreasonable delay in responding to FOIA requests." Liverman v. Office of the
10 Inspector Gen., 139 Fed. Appx. 942, 944 (10th Cir. 2005) (quoting Mayock v. Nelson, 938 F.2d
11 1006, 1008 (9th Cir. 1991)). However, there being only Plaintiff Hajro's single November 2007
12 FOIA request at issue and to the extent that such claim of unreasonable delay is not moot,
13 Plaintiffs have not established a pattern and practice of unreasonable delay. See 5 U.S.C. §
14 552(a)(6)(A)(i) (requiring an agency to respond to a FOIA request within twenty working days).

15 Here, Plaintiff Hajro made his FOIA request on November 7, 2007. Eggleston Decl., ¶ 5.
16 USCIS acknowledged the request and declined to expedite the request on November 19, 2007.
17 Eggleston Decl., 6. The agency further advised Plaintiff Hajro that the request would be
18 processed under the Tier II track, and thus would take more than 20 days to process. Eggleston
19 Decl., ¶ 6. The National Records Center did not receive Plaintiff Hajro's alien file from the San
20 Francisco District Office of USCIS until February 25, 2008, and processing Plaintiff Hajro
21 request in under 10 days. Eggleston, Decl. ¶ 11. A subsequent disclosure was made on July 31,
22 2008. Eggleston, Decl. ¶ 13.

23 Plaintiff Hajro's FOIA request was not received from the San Francisco Field Office for FOIA
24 processing for nearly three months, but was processed in under 10 days once received. Eggleston
25 Decl., ¶¶ 11, 12. Further, USCIS processes FOIA cases on a first in/first out basis as a matter of
26 policy when an expedite request is denied. Eggleston Decl. ¶ 12.

27 Plaintiffs have by no means established a pattern and practice of delay with the facts here. In
28 any event, the D.C. Circuit Court has found that an agency's dilatoriness, standing alone, in

1 responding to a FOIA request is not evidence of bad faith. See Goland v. CIA, 607 F.2d 339, 355
 2 (D.C. Cir. 1978) (finding that although the agency's responses were not always timely, “the
 3 [agency's] delay alone cannot be said to indicate an absence of good faith”); Open America v.
 4 Watergate Special Prosecution Force, 547 F.2d 605, 616 (D.C. Cir. 1976) (holding that processing
 5 FOIA requests in “a first-in, first-out basis” may constitute good faith efforts, even if not within
 6 the twenty-day statutory deadline); see also Wheeler v. U.S. Dep't of Justice, 462 F.Supp.2d 48,
 7 54 (D.D.C. 2006) (finding that the agency's one-year delay in responding to a FOIA request did
 8 not necessarily render the search unreasonable or inadequate).

9 Thus Plaintiffs have failed to established a pattern and practice of delay and summary
 10 judgment of this claim should be granted in Defendants’ favor.

11 **G. Plaintiffs’ First and Second Causes of Action Should be Dismissed Because the 1992**
 12 **Settlement Agreement was Superseded By Statute in 1996.**

13 Plaintiffs’ assert that USCIS’s Track III FOIA processing policy and 6 C.F.R. § 5.5(d)
 14 “violates the Settlement Agreement.” Am. Compl, First Cause of Action. Plaintiffs ask this
 15 Court to enforce the 1992 Settlement Agreement. Am Compl., Prayer ¶ A, B, C, D. Plaintiffs
 16 also allege that Defendants’ denial of Plaintiff Hajro’s November 2007 request for expedited
 17 processing of his FOIA request “violated the Settlement Agreement.” Am Compl., Second Cause
 18 of Action.

19 This Court cannot enforce the 1992 Settlement Agreement because it has been superseded by
 20 statute. Congress enacted the FOIA in 1966 to grant a right of public access to governmental
 21 information “long shielded unnecessarily from public view” and authorized judicial enforcement
 22 of that right against “possibly unwilling official hands.” EPA v. Mink, 410 U.S. 73, 80 (1973),
 23 superseded by statute, Freedom of Information Act, Pub.L. No. 93-502, § 2(a), 88 Stat. 1563
 24 (1973).

25 Agencies ordinarily process FOIA requests for agency records on a first-in, first-out basis.
 26 In 1996, four years after the 1992 Settlement Agreement, Congress amended the FOIA to provide
 27 for “expedited processing” of certain categories of requests. See Electronic Freedom of
 28 Information Amendments of 1996, Pub. L. 104-231, § 8 (codified at 5 U.S.C. § 552(a)(6)(E))

1 (“EFOIA”). Expedition, when granted, entitles requestors to move immediately to the front of an
 2 agency processing queue, ahead of requests filed previously by other persons.

3 As part of EFOIA, Congress directed agencies to promulgate regulations providing for
 4 expedited processing of requests for records. Specifically, Congress directed agencies to enact
 5 regulations providing for expedited processing (i) “in cases in which the person requesting the
 6 records demonstrates a compelling need”; 5 U.S.C. § 552(a)(6)(E)(i)(I); and (ii) “in other cases
 7 determined by the agency.” Id. § 552(a)(6)(E)(i)(II). The statute defines “compelling need” to
 8 mean:

9 (I) that a failure to obtain requested records on an expedited basis under this
 10 paragraph could reasonably be expected to pose an imminent threat to the life or
 physical safety of an individual; or

11 (II) with respect to a request made by a person primarily engaged in disseminating
 12 information, urgency to inform the public concerning actual or alleged Federal
 Government activity.

13 Id. § 552(a)(6)(E)(v)(I), (II). Requests for expedited processing which an agency grants are to be
 14 processed “as soon as practicable.” Id. § 552(a)(6)(E)(iii).

15 The EFOIA House Report states that the EFOIA expedition categories should be “‘narrowly
 16 applied.’” Al-Fayed v. Central Intelligence Agency, 254 F.3d 300, 310 (D.C. Cir. 2001) (quoting
 17 Electronic Freedom of Information Amendments of 1996, H.R. Rep. No. 104-795, at 26 (1996)).
 18 As the D.C. Circuit explained in Al-Fayed: “Congress’ rationale for a narrow application is clear:
 19 “Given the finite resources generally available for fulfilling FOIA requests, unduly generous use
 20 of the expedited processing procedure would unfairly disadvantage other requestors who do not
 21 qualify for its treatment.’ . . . Indeed, an unduly generous approach would also disadvantage those
 22 requestors who do qualify for expedition, because prioritizing all requests would effectively
 23 prioritize none.” 254 F.3d at 310 (quoting H.R. Rep. No. 104-795, at 26).

24 The requestor bears the burden of showing that expedition is appropriate. See Al-Fayed,
 25 254 F.3d at 305 n.4 (quoting H.R. Rep. No. 104-795, at 25). Agency decisions to deny or affirm
 26 denial of a request for expedited processing are subject to judicial review. 5 U.S.C. §
 27 552(a)(6)(E)(iii). Such judicial review “shall be based on the record before the agency at the
 28 time of the determination.” (Id.).

1 The standard for reviewing agency decisions to deny expedition depends on the ground for
 2 decision. As noted above, an agency may grant expedition “in cases in which the person
 3 requesting the records demonstrates a compelling need,” 5 U.S.C. § 552(a)(6)(E)(i)(I), or “in
 4 other cases determined by the agency.” Id. § 552(a)(6)(E)(i)(II); see also Al-Fayed, 254 F.3d at
 5 307 n.7 (noting this latter provision gives agencies “‘latitude to expand the criteria for expedited
 6 access’ beyond cases of ‘compelling need’”) (quoting H.R. Rep. No. 104-795, at 26). A decision
 7 denying expedited processing for failure to establish “compelling need” under Section
 8 552(a)(6)(E)(i)(I) is reviewed de novo. See Al-Fayed, 254 F.3d at 308. A decision denying
 9 expedited processing for failure to meet criteria established by an agency under Section
 10 552(a)(6)(E)(i)(II) is reviewed under a more deferential “reasonableness” standard. See Al-
 11 Fayed, 254 F.3d at 307 n.7 (noting that, “to the extent [the agency FOIA] regulations expand the
 12 criteria for expedited processing beyond ‘compelling need,’ the agencies reasonably determined
 13 that plaintiffs’ requests did not meet the expanded criteria”).

14 Further, on March 1, 2003, the Immigration and Nationality Service (“INS”) was dissolved
 15 and reconstituted as the Department of Homeland Security (“DHS”). DHS’s implementing
 16 regulations mirror EFOIA’s expedited processing directives. See 6 C.F.R. § 5.5(d).⁵ The
 17 regulations also provide that generally, requests are processed in their order of receipt. 6 C.F.R. §
 18 5.5(a). The regulations also provide guidance as to what needs to be presented for expedited
 19 processing and for an administrative appeal of the denial of a request to expedite. 6 C.F.R. §
 20 5.5(d)(3),(4).

21 Hence, any denial of a request to expedite, for whatever reason, is subject to review
 22

23 ⁵6 C.F.R. § 5.5(d)(1) reads:

24 Requests and appeals will be taken out of order and given expedited treatment whenever
 25 it is determined that they involve:

26 (i) Circumstances in which the lack of expedited treatment could reasonably be expected
 27 to pose an imminent threat to the life or physical safety of an individual;
 28 (ii) An urgency to inform the public about an actual or alleged federal government
 activity, if made by a person primarily engaged in disseminating information.

1 administratively and to judicial review under the 1996 EFOIA amendments, not the 1992
 2 Settlement Agreement. Enforcement of the 1992 Settlement Agreement is outside the bounds of
 3 this Court's jurisdiction as it has been superseded by statutes and regulations that guide the
 4 agencies. Further, to the extent Plaintiffs might seek to use the APA as a vehicle to challenge
 5 DHS' processing of FOIA requests, that would be impermissible as the EFOIA itself provides an
 6 adequate remedy for Plaintiffs' claims and separate APA review is not available. See 5 U.S.C. §
 7 703 (APA review available "except to the extent that prior, adequate, and exclusive opportunity
 8 for judicial review is provided by law"); 5 U.S.C. § 704 (APA review of actions "for which there
 9 is no other adequate remedy in a court . . ."). "Congress did not intend the general grant of review
 10 in the APA to duplicate existing procedures for review of agency action." Bowen v.
 11 Massachusetts, 487 U.S. 879, 903 (1988).

12 Therefore, the First Cause of Action and the Second Causes of Action and any request to
 13 enforce the 1992 Settlement Agreement must be dismissed for failure to state a claim upon which
 14 relief can be granted and judgment should be entered in Defendants' favor.

15 **H. Summary Judgment Should be Granted in Defendants' Favor on Cause of Action**
 16 **Nine because USCIS's "Track Three" FOIA Processing Policy is Exempt from The**
Notice and Comment Requirements Set Forth in the APA.

17 Plaintiffs allege that "Defendants' failure to provide a general notice of proposed rule
 18 making and public comment period prior to implementing the new 'Track Three' policy violates
 19 the Administrative Procedures Act, 5 U.S.C. § 553." Am Compl., Ninth Cause of Action. This
 20 claim fails.

21 The USCIS did not violate the APA because Track III is a "rule[]" of agency organization,
 22 procedure, or practice" and therefore does not require general notice of proposed rulemaking and
 23 formal comment procedures. 5 U.S.C. § 553(b)(3)(A). The exemption for rules of agency
 24 organization, procedure, or practice "extends to 'technical regulation of the form of agency action
 25 and proceedings.'" Southern California Edison Co. v. F.E.R.C., 770 F.2d 779, 783 (9th Cir.
 26 1985) (citation omitted). "'Procedural' rules are those that are 'legitimate means of structuring
 27 [the agency's] enforcement authority.'" Erringer v. Thompson, 371 F.3d 625, 633 n. 15 (9th Cir.
 28

2004) (citation omitted); see also Chamber of Commerce of U.S. v. U.S. Dept. of Labor, 174 F.3d 206, 211 (D.C. Cir. 1999) (exemption is applied with “an eye toward balancing the need for public participation in agency decisionmaking with the agency’s competing interest in ‘retain[ing] latitude in organizing [its] internal operations.’”). The USCIS legitimately exercised this authority over its internal processes by creating Track III in order to “provide the public with more expeditious service and to thereby improve customer satisfaction.” Am. Complaint, Exh. C, p. 22.

The Supreme Court affirmed a case that explicitly ruled that an agency’s decision to add two new tracks for processing petitions to the agency at an expedited rate fell within the exemption in § 553(b)(3)(A). See Commonwealth of Pennsylvania v. United States, 361 F.Supp. 208 (M.D. Pa. 1973) (three-judge court), aff’d per curiam, 414 U.S. 1017 (1973) (Mem). In Pennsylvania, a number of state agencies and labor unions challenged the establishment of new rules by the Interstate Commerce Commission (ICC) governing petitions for abandonment of railroad lines. Id. The ICC established, in addition to the previous “long form,” two new “short forms,” Subpart B and Subpart C, for abandonment petitions. Id. at 210. Subpart B created a new rebuttable presumption that a railroad track has been abandoned if particular conditions of railroad usage were met. Id. Subpart C provided petitioners a shorter form for use when they did not anticipate an objection by the railroad. Id. The court held that since “[t]he substantive law which the Commission will apply in determining whether abandonment certificates should be granted has not been changed,” id. at 221, “the requirements of §4 [of the APA, 5 U.S.C. §553,] for public participation in rulemaking do not apply to the rules *sub judice*.” Id. at 222. The Supreme Court affirmed the district court’s decision without a written opinion. See Pennsylvania v. U. S., 414 U.S. 1017 (1973).

Track III represents a procedure strikingly similar to the rule in Pennsylvania and it therefore falls within the APA’s exemption for procedural rules. Like the rule in Pennsylvania, the establishment of Track III simply creates another expedited path for the agency’s internal review of FOIA requests. Implementing a rule that “simply prescribes ‘the manner in which the parties present themselves or their viewpoints to the agency’ does not alter the underlying rights or interests of the parties.” Inova Alexandria Hosp. v. Shalala, 244 F.3d 342, 349 (4th Cir. 2001),

1 quoting Batterton v. Marshall, 648 F.2d 694, 707 (D.C.Cir.1980). Like the ICC's new procedures
2 in Pennsylvania, Track III does not affect the substantive criteria the agency uses to evaluate the
3 merits of a FOIA request, which are specified in FOIA itself; rather, it deals only with the speed at
4 which they are processed. If anything, Track III is even more purely procedural than the rules in
5 Pennsylvania because, unlike the new ICC application tracks, it does not create any new
6 presumptions or criteria for assessing whether to grant the FOIA requests.

7 Finally, Plaintiffs fail to show that the implementation of Track III in any way affects the
8 beneficiaries of the Mayock Settlement Agreement. But even if this procedural rule *did* have a
9 substantive impact on those individuals, the implementation of this procedural rule would still be
10 exempted from the notice and comment requirements of § 553. See Southern California Edison
11 Co. v. F.E.R.C., F.2d 779, 783 (9th Cir. 1985) ("In light of that express exemption, [the Ninth
12 Circuit has] rejected the notion that procedural rules with a substantive impact are subject to the
13 notice and comment requirements." Southern California Edison Co. v. F.E.R.C., F.2d 779, 783
14 (9th Cir. 1985) (citing Rivera v. Becerra, 714 F.2d 887, 890-91 (9th Cir.1983)). Because, like the
15 ICC rules in Pennsylvania, the implementation of Track III is a rule governing the internal
16 procedures of the USCIS, it falls under the exemption to notice and comment proceedings in §
17 553(b)(3)(A).

18 V. CONCLUSION

19 The Court should grant Defendants' Motion for Summary Judgment. The First and
20 Second Causes of Action, and any claims seeking enforcement of the 1992 Settlement Agreement
21 should be dismissed for failure to state a claim upon which relief can be granted. The Ninth
22 Cause of Action and any claims that the APA was violated for improper notice and comment
23 period should be dismissed as baseless. Plaintiff Mayock should be dismissed for lack of
24 standing. All FOIA claims against Defendants other than the USCIS should be dismissed for lack
25 of jurisdiction and Defendant U.S. Attorney General Michael B. Mukasey should be dismissed as
26 an improper defendant.

27 ///

1 Dated: August 10, 2009

Respectfully submitted,

2 JOSEPH P. RUSSONIELLO
3 United States Attorney

4 /s/

5 ILA C. DEISS
6 Assistant United States Attorney
7 Attorneys for Defendant
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28