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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

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| MIRSAD HAJRO, JAMES R. MAYOCK<br><br>Plaintiffs,<br><br>v.<br>UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES,<br>T. DIANE CEJKA, Director USCIS National Records Center,<br>ROSEMARY MELVILLE, USCIS District Director of San Francisco,<br>JANET NAPOLITANO, Secretary Department of Homeland Security,<br>ERIC HOLDER, Attorney General Department of Justice<br>Defendants | **Case No. CV 08 1350 PVT**<br><br>**PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES** |

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**TABLE OF CONTENTS**

## TABLE OF AUTHORITIES

**CASES**



//

//

//

**STATUTES**



//

**REGULATIONS**



**OTHER AUTHORITIES**



//

//

//

//

**MEMORANDUM OF POINTS AND AUTHORITIES**

## I. INTRODUCTION

In their June 2008 First Amended Complaint "FAC", Plaintiffs bring nine causes of action against Defendants seeking relief under the Freedom Of Information Act "FOIA" and the Administrative Procedure Act "APA". Plaintiffs move for summary judgment of the FAC in its entirety as there are no material facts in dispute and Plaintiffs are entitled to a judgment as a matter of law.

## II. FACTS

Defendants have continued to exceed the statutory time limits in responding to FOIA requests and have refused to acknowledge their duty under the Settlement Agreement and the Constitution to expedite FOIA requests when substantial due process interests may be harmed.

The following time line relates the significant events in Plaintiff Hajro's naturalization case since the FAC:

July 31, 2008 - Supplemental FOIA response releasing 13 pages.*(Attachment 1)*

October 16, 2008 - Hearing on denial of Mr. Hajro's first naturalization application pursuant to 8 USC § 1447(a).

November 26, 2008 - Hearing decision denying naturalization appeal of first naturalization application.

December 8, 2008 - Plaintiffs' counsel mailed a FOIA request for a copy of the declaration by the USCIS examiner referred to in the denial.

January 5, 2009 - Plaintiffs' counsel received a letter stating that USCIS had placed this FOIA request on the "simple track" (Track One). *(Attachment 2)*

January 23, 2009 - Interview in San Francisco on Mr. Hajro's second naturalization application. This second application was filed under 8 USC §1430. The first application was filed under 8 USC § 1427.

March 31, 2009 -Decision denying Mr Hajro's second naturalization application

September 14, 2009 - Plaintiffs' counsel received a copy of the declaration by USCIS officer Rose Marie Atkinson. This "simple track" FOIA request for one document took approximately nine months to process.*(Attachments 2 and 3)*

October 22, 2009 - Hearing on denial of Mr. Hajro's second naturalization appl.

## III. LEGAL STANDARDS

Plaintiffs accept Defendants' recitation of the applicable legal standards regarding summary judgment. Judicial review of withholding agency records under FOIA is *de novo*. 5 U.S.C. § 552(a)(4)(B).

## IV. ARGUMENT

### A. Jurisdiction and Standing

Defendants should not be dismissed. Plaintiff Mayock has standing. Plaintiffs have previously briefed these issues. Plaintiffs respectfully direct the Court to Plaintiffs' Opposition to Defendants' Motion To Dismiss at pages 9-11 and 14-16. (Doct 35) Plaintiffs make the following additional points:

1. Because Plaintiffs allege a pattern and practice of violations of the FOIA statute, violations of a settlement agreement, and constitutional and APA violations, Defendants' arguments re only naming the agency as defendant, are inapposite here. In a previous pattern and practice lawsuit concerning FOIA delays in the immigration context, neither the District Court nor the Ninth Circuit dismissed the Commissioner of the Immigration and Naturalization Service or the San Francisco INS District Director as defendants. See, *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).

2. Defendants concede that "previously Plaintiff Mayock was found to have standing to challenge the former INS' failure to timely respond to his

client's FOIA requests. Def. MSJ at fn.2 Defendants' assert incorrectly that "Plaintiff Mayock makes no similar allegation here". See FAC ¶16 and Plaintiff Mayock's declaration attached to this brief (*Attachment 4*)

3. Paragraph 11 of the Settlement Agreement confers standing on Plaintiff Mayock. (*See infra*, p 9)

**B. Plaintiffs Have Established A Pattern And Practice Of Violation of FOIA**

Plaintiffs have established a pattern and practice of Defendants failing to comply with the time requirements set forth in 5 U.S.C. § 552(a)(6)(A),(B),(C). Plaintiffs are attaching 26 declarations from immigration attorneys which show that Defendants' delays in providing FOIA replies are often several months, instead of the twenty days required by statute[1]. 5 U.S.C. § 552(a)(6)(A)(i)[2] These declarations explain that these delays are prejudicial to effective legal representation. [3] *(Attachment 7)*

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[1]Plaintiffs' counsel also attached FOIA responses to the Complaint which illustrate these lengthy delays. *See FAC Exhibit M*. Defendants have set up multiple tracks for "simple requests" (Track One) and "complex requests" (Track Two) to improve efficiency. In reality, it appears to make no difference under which of these two tracks a request is processed in terms of delay. *e.g., See Attachments 2&3 and Attachment 7 pp111-113 and 117*-119.

[2]Defendants are also required to make a determination with respect to any appeal within twenty business days after receipt of such appeal. 5 U.S.C. § 552(a)(6)(A)(ii). In reality, an appeal can take as long as four and a half years . *(Attachment 5)*

[3]There are also undue delays in processing mail. It would be reasonable to allow 3 days for receipt of mail each way, but this is not the case: 1)It appears that Def. often process their mail showing a "received" date later than the actual date of receipt. *See,e.g.Attach.7* pp104-105 (mailed 1-26-09, received 1-30-09, receipt date 3-4-09. 2) Responses are often mailed many days past the date on the response letters. *See, e.g. Attach. 6*, response date 3-4-08 but return envelope mailed 3-24-08. (Note: The Eggleston decl. at ¶11 is erroneous on this point.) *and Attach.7*, pp 79-81 (response 7-17-09 and return envelope

The declarations also establish that Defendants routinely violate the statute by failing to give the mandatory written notice to the applicant setting forth the "unusual circumstances" that qualify for a ten day extension of time. 5 U.S.C. § 552(a)(6)(B).

Finally, Defendants have failed to show exceptional circumstances exist and that the agency is exercising due diligence in responding to FOIA requests. 5 U.S.C. § 552(a)(6)(C).[4] Instead, Defendants offer excuses in Mr. Hajro's case: "Plaintiff made his FOIA request on November 7, 2007…The National Records Center did not receive Plaintiff Hajro's alien file from the San Francisco District Office of USCIS until February 25, 2008." (Def. MSJ at 9) Plaintiff Hajro filed his request directly with the National Records Center. The fact that Defendants took three and half months to transfer his alien file from San Francisco does not toll the twenty day period. At most, it would allow an additional ten days under 5 U.S.C. § 552(a)(6)(B)(iii)(I), except that Defendants failed to issue the required written notice for an extension of time under 5 U.S.C. § 552(a)(6)(B)(i)and (ii). To their credit, Defendants concede such action violated the statute. "Defendant exceeded the time statutorily allotted for processing Plaintiff's FOIA request." Eggleston Decl. ¶12.

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mailed 7-27-09. Because Defendants employ outside mailing contractors they may not be aware of these additional delays caused by their agents.

[4]In the *The Electronic Freedom of Information Amendments of 1996, Pub. L. 104-231, 110 Stat. 3048* Congress limited the ability of an agency with a heavy FOIA backlog to obtain a stay of judicial proceedings on the basis of that backlog under the precedent of *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976). In so doing, Congress passed an amendment to FOIA which reflected Judge Leventhal's famous dissent in *Open America*: "…the term 'exceptional circumstances' does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests." 5 U.S.C. § 552(a)(6)(C)(ii)

Injunctive relief is available to remedy a pattern and practice of FOIA violations by an agency. *Long v. United States Internal Revenue Service*, 693 F.2d 907 (9th Cir. 1982); *Payne Enterprises v. United States*, 837 F. 2d 486 (D.C. Cir. 1988) (lower court abused its discretion in denying equitable relief to requestor in face of persistent agency non-compliance with the FOIA); *Nat'l Sec. Archive Fund v. Dep't of Air Force*, 2006 WL 1030152 (D.D.C. 2006) (finding pattern and practice in agency's inability to respond to FOIA time limits)

Plaintiffs have presented substantial and uncontroverted evidence that lengthy delays are systematic and prejudicial to effective legal representation. Defendants respond that "an agency's dilatoriness, standing alone, in responding to a FOIA request is not evidence of bad faith." Def. MSJ at 9-10. However, the issue before this Court is not determining the presence or absence of bad faith. The statute may be violated even absent bad faith. *Long* does not require the district court to weigh "the good faith of any expressed intent to comply." *Long*, at 909. The issue is whether the practices of Defendants are in compliance with the requirements of FOIA. If not, injunctive relief is available under the *Long* analysis. *Mayock v. I.N.S.*, 714 F. Supp 1558, 1561-62 (N.D. Cal.1989), rev'd and remanded on other grounds *sub nom. Mayock v. Nelson*, 938 F. 2d 1006 (9th Cir. 1991).

**C. The Settlement Agreement Was Not Superceded By Statute**

Plaintiffs' have previously briefed this issue. Plaintiffs respectfully direct the Court to Plaintiffs' Opposition to Defendants' Motion To Dismiss at pages 1-8[5]. Plaintiffs make the following additional arguments in support of their

[5]Plaintiffs add Customs and Border Protection "CBP" to the list of agencies (DOS, DOJ, DHS) that have reported that they maintained the "exceptional need or urgency" standard to expedite FOIA requests post EFOIA. *See,* Pl. Opp. to Def. MTD p.7 *(Attachment 8)*

position that the "exceptional need or urgency" standard[6] embodied in the Settlement Agreement was not superceded by statute in 1996:

1. The Constitution Requires That The Compelling Need Standard Only Applies To Requests Than Cannot Wait 20(30) Days

In 1996, the EFOIA amendments changed the landscape of FOIA. Heretofore, FOIA responses were due in 10 days. Government agencies complained that this time frame was insufficient time. In response, Congress expanded the response time to 20 business days and 30 business days in "unusual circumstances". By doubling and tripling the response time, Congress expected agencies to comply within this newly expanded time limit and that records would be made "promptly available". 5 U.S.C. § 552(a)(3)(A) Congress never envisioned that a post 30 day response time would be the norm. However, Congress foresaw that within this newly expanded 20 (30) day regime that there could occur circumstances of "compelling need" in which even waiting 20 or 30 days was too long a delay. For those imminent emergency circumstances that could not wait the normal 20(30) days, Congress carved out an exception for expedited processing in two areas: 1) "an imminent threat to the life or physical safety of an individual" 2) "urgency to inform the public" of government activity by the media.

Defendants have not been deterred by the 1996 EFOIA amendments requiring a 20(30) day response time. Defendants persist in grossly violating

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[6]The "exceptional need or urgency" standard applies when A) an individual's life or personal safety would be jeopardized by the failure to process a request immediately; or B) the requestor demonstrates that substantial due process rights would be impaired by the failure to process immediately, and the information sought is not otherwise available. *(See, Complaint Exhibit "B": DOJ Memo "Policy on Priority for Processing FOIA/PA Requests" 4/29/92)* at pp 18-19 and *"When to Expedite FOIA Requests" (1983) DOJ Office of Information and Privacy FOIA Update* at pp 21A-21B.

this statutory requirement and have established a norm of a six to eighteen month response time. Congress never intended FOIA to work this way[7]. The problem we have only exists due to the government's own action of delaying FOIA responses for months and months, sometimes extending beyond a year.

On top of this pattern and practice of violating the statute, Defendants have misinterpreted the compelling need standard and say that no matter how long they delay their response, expedites can only be granted under the narrow confines of 6 C.F.R. §5.5(d) or Track Three. Such delay can, in some cases, lead to the impairment of substantial due process rights. This is what led to the adoption of the "exceptional need or urgency" test in *Open America v. Watergate Special Pros. Force*, 547 F.2d 605, 616 (D.C. Cir. 1976) and various government agencies, including Def. *See*, Pl. Opp. to MTD p.7 *and Attachment* 8. Accepting Defendants' interpretation of the statute is impermissible as it allows the statute to be applied in such a way as to violate due process.

There is only one way to read the statute and not allow rolling violations of the Constitution by the government: The "compelling need" standard applies to cases of imminent need that cannot wait 20(30) days. The Constitution requires that expedited processing is still available for cases which threaten harm to substantial due process rights[8]. Plaintiffs' reading of the

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[7]In the *OPEN Government Act of 2007*, Pub.L.No. 110-175, §6, 121 Stat. 2524, Congress reaffirmed its commitment to "reverse the troubling trends of excessive delays and lax FOIA compliance in our government" and "restore(s) meaningful deadlines for agency action". Senator Leahy, *Cong. Record*, S15831-S15832 (Dec. 18, 2007).

[8]This means the only regulatory implementation that is permissible for expediting FOIA requests is one that conforms to due process. Examples include 22 C.F.R. §171.12(b)(1) (DOS); 28 C.F.R. § 16.5(d)(iii) (DOJ); and *CBP FOIA Reference Guide "VI. Expedited Processing"*(*Attachment 8*) (In administrative proceedings without discovery, expedited access may be granted

statute is correlative with Due Process because otherwise substantive due process rights will potentially be harmed on a continuous basis. The Court must construe the statute to avoid a constitutional issue[9].

2. USCIS, as the Successor to INS, Retained the DOJ Standard of "Exceptional Need or Urgency"

Plaintiffs have previously argued that Defendants' policy for expediting requests maintained the "exceptional need or urgency" standard both before and after the EFOIA amendments of 1996. *See*, Pl. Opp to MTD, p.8. Defendants were permitted to maintain this more generous standard post EFOIA under 5 U.S.C. §552(a)(6)(E)(i)(II). Further evidence of this is found in the "Supplementary Information" which accompanied the publication of Defendants' interim rule which established procedures for the DHS to implement FOIA, including 6 CFR §5.5(b) and (d). There DHS stated:

> *Except to the extent* a Department component *has adopted* separate guidance under FOIA or the Privacy Act, the provisions of this subpart shall to apply [sic] each component of the Department. 68 FR 4056 (01/27/03) (emphasis added)

USCIS is a component agency of DHS as well as the successor agency to the DOJ which previously was responsible for FOIA requests for alien files. The DOJ had adopted the "exceptional need or urgency" standard[10]. This standard

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to protect substantial due process rights where time is of the essence)

[9]When faced with a statute that can be read it two ways, one which would violate the Constitution and the other which does not violate the Constitution, the Court must choose the latter over the former. *Ashwander v T.V.A.*, 297 U.S. 288 (1936) (Justice Brandeis Concurring).

[10]*See*, *H.R. Report No. 104-795 at 26; the Settlement Agreement*; and 28 CFR § 16.5(d)(iii).

constituted "separate guidance" adopted by "a Department component" and was not superceded by the new regulations, but rather complemented them.

3. Mayock Never Received Notice of Termination of the Settlement Agreement

Paragraph 11 of the Settlement Agreement states:

> Defendant retains the right to amend, change, revise, or terminate any practice or policy of concern herein. Plaintiff, in the event of any such amendment, change, revision, or termination by defendant of any practice or policy of concern herein, shall retain the right to institute a new action challenging any such amendment, change, revision, or termination and any of its consequences.[11]

Although the Settlement Agreement contains no express notice provision, Plaintiffs submit that a notice requirement to Plaintiff Mayock of any "amendment, change, revision, or termination" is implied by the language of paragraph 11. Otherwise, the Mayock lawsuit could have been settled and Defendants could have silently amended, changed, revised or terminated the Settlement Agreement one minute later and Plaintiff Mayock would have never known. Such an interpretation would defeat his right "to institute a new action challenging such amendment, change, revision, or termination and any of its consequences." If the government can amend, change, revise, or terminate the Settlement Agreement without giving notice, then there is no basis for distinguishing between a violation and any such change in the practice or policy of the Agreement. This is because if the government gives notice then there is no expectation of compliance. If the govt does not give notice, then what the

[11]This paragraph alone confers standing on Plaintiff Mayock.

govt has done is tantamount to a violation. Furthermore, without notice, the government can always disguise a violation by retroactively claiming it was a change permitted by the "escape clause". Thus, without an implied notice requirement, the Agreement becomes worthless and meaningless.

Plaintiff Mayock never received notice that the Settlement Agreement had been amended, changed, revised, or terminated[12]. In the absence of such notice, the Settlement Agreement remained in force.

4. No Notice And Receipt Of Public Comment

Assuming *arguendo* that the absence of notice to Plaintiff Mayock did not vitiate the Settlement Agreement, there is another reason it remained in force. After EFOIA, the "escape clause" of ¶11 could only be exercised "pursuant to notice and receipt of public comment" in connection with promulgated regulations providing for expedited processing of requests for records. 5 U.S.C. § 552(a)(6)(E) As explained in the next section, that never happened.

**D. Track Three Violated Both the APA and FOIA**

Defendants' failure to provide a notice of proposed rule making and public comment prior to implementing Track Three violated both the APA and FOIA.

1. The APA

The APA requires agencies to follow certain procedures when it decides to issue a rule, including: (1) publishing notice of the proposed rule-making in the

[12]See Mayock declaration. *(Attachment 4)*

Federal Register, 5 U.S.C.§553(b); (2) providing a period for interested persons to comment on the proposed rule, which comments will be considered by the agency prior to adopting the rule, 5 U.S.C.§553(c); and (3) publishing the adopted rule not less than thirty days before its effective date... 5 U.S.C.§553(d)

When it implemented Track Three, USCIS did not publish a "Proposed Rule" in the Federal Register. Instead, USCIS published a "Notice" in the Federal Register on February 28, 2007 stating "This notice is effective March 30, 2007". 72 FR 9017 (02/28/07) This "notice" failed to provide for a period of public comment. In acting this way, the agency violated the APA because it failed to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments..." id. at § 553(c). As members of the public, Plaintiffs were adversely affected by the lack of a public comment period because they were deprived of the opportunity to participate in the rule making through submission of written data, views, or arguments such as those issues raised in this lawsuit.

Def. argue "USCIS did not violate the APA because Track III is a 'rule of agency organization, procedure, or practice' and therefore does not require general notice of proposed rulemaking and formal comment procedures..." (Def. MSJ p 13) This argument misses the mark. The APA provides:

> *Except when notice or hearing is required by statute*, this subsection does not apply - (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice...5 U.S.C. §553 (b) (emphasis added)

Assuming *arguendo* that Track Three is a "rule of agency organization, procedure, or practice" this exemption from proposed rule making does not apply if notice or hearing is required by statute. In this case, "notice[13] or hearing" was required by a statute. That statute was FOIA. 5 U.S.C.§ §552(a)(6)(E). This critical fact distinguishes this case from the cases cited by Defendants in their brief. Def. MSJ p.13-15.[14]

2. FOIA

This action by USCIS also violated the FOIA which states:

> Each agency may promulgate regulations, *pursuant to notice and receipt of public comment*, providing for multitrack processing of requests for records... 5 U.S.C. §552(a)(6)(D) (emphasis added)
> Each agency shall promulgate regulations, *pursuant to notice and receipt of public comment*, providing for expedited processing of requests for records... 5 U.S.C. §552(a)(6)(E) (emphasis added).

Defendants' promulgation of FOIA regulations did not release them from their statutory obligation to promulgate regulations with notice and comment for their adoption of multitrack processing. The Department of Homeland Security "DHS" published a general regulation allowing its component agencies

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[13]Under the APA, "notice" includes receipt of public comment. 5 U.S.C. §553 (c)

[14]Thus Plaintiffs believe that the Court need not weigh into the question of whether or not Track Three is a substantive or procedural rule. That being said, Plaintiffs point out that the implementation of Track Three represents a significant change from the Settlement Agreement and has had an adverse impact on individuals not in removal hearings who were previously allowed expedited processing under the Settlement Agreement. This is illustrated by the facts in the case of Plaintiff Hajro, and the Pauw declaration (*Complaint Exhibit "S"* and the Lieberman declaration. (*Attachment 7*, p73-85).

to adopt multitrack processing of which USCIS is one. 6 C.F.R. §5.5(b)[15] However once USCIS chose to adopt and implement a multitrack system, the FOIA statute required USCIS to promulgate its own regulations, pursuant to notice and public comment. 5 U.S.C. §552(a)(6)(D). It failed to do this.[16]

DHS also promulgated a regulation providing for expedited processing. 6 C.F.R. §5.5(d). USCIS was permitted to adopt its own expedited processing guidelines under 6 C.F.R §5.1(a)(2) but was not free to escape the statutory mandate of promulgating such change, i.e. "Track Three", as a regulation pursuant to notice and public comment. 5 U.S.C. §552(a)(6)(E)

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[15]Plaintiffs maintain that 6 C.F.R §§5.5 (b) and (d) also violate FOIA because they were not promulgated "pursuant to notice and receipt of public comment". See 68 FR 4056 (01/27/03) stating that "notice and public procedure are impracticable, unnecessary and contrary to public interest pursuant to 5 U.S.C. §553(b)(B). However, an agency can use this "good cause" exemption "except when notice or hearing is required by statute". 5 U.S.C. §553(b). In this case, "notice or hearing" was required by a statute. That statute was FOIA. 5 U.S.C.§ §552(a)(6)(D) and (E). Therefore both the parent regulation of Track Three (6 C.F.R §§5.5 (b) and (d)) and Track Three itself violate FOIA.

[16]There are two relevant regulations: 6 C.F.R. §5.5(d) (previously discussed) and 8 C.F.R. §103.8: "Sections 103.8, 103.9, and 103.10 of this part comprise the Service regulations under the Freedom of Information Act. 5 U.S.C. §552. These regulations supplement those of the Department of Justice, 28 CFR Part 16, Subpart A." Here Legacy INS adopted, by reference, the DOJ regulation on expedited processing including 28 CFR §16.5(d)(iii)( "the loss of substantial due process rights"). The continued existence of these regulations in 8 C.F.R. six years after the creation of the Department of Homeland Security is confusing to the public, at the very least, and provides additional support for the argument that "Track Three" should have been published as a proposed regulation.

If the Court finds that 6 C.F.R. §5.5(b) and (d) are null and void because they were promulgated without the notice and comment required by FOIA, the pre-existing standard of "exceptional need or urgency" should survive intact.

Courts have broad equitable powers to remedy violations of FOIA and may issue injunctions to fashion an appropriate remedy. Plaintiffs seek an injunction requiring Defendants to initiate a notice and comment procedure to remedy the defects in the promulgation of 6 CFR §§5.5 (b) and (d)) and Track 3.

**E. Track Three, As Implemented, Violates Equal Protection**

Defendants' Track Three policy violates the Fifth Amendment guarantee of Equal Protection under the United States Constitution. Aliens whose substantial due process rights would be impaired by failure to process immediately are treated arbitrarily under this policy and the distinction created lacks a rational basis. The policy creates two classes of aliens both of whom require expedited processing of their FOIA requests to ensure due process in the treatment of their immigration cases, except for the fact that members of one class are in removal proceedings. Aliens who can demonstrate that substantial due process rights would be impaired by failure to process immediately but are not in removal proceedings do not qualify for Track Three.

Even amongst those aliens in removal proceedings, only those with cases pending before an immigration judge qualify for Track Three. Aliens in removal proceedings who cases are on appeal to the Board of Immigration Appeals or

federal court cannot qualify for Track Three processing. [17]

If there is a group of aliens all of whose constitutional rights to due process will be impaired by government delay[18], the government cannot divide this one large group into subgroups and say "we will choose to protect due process for this group but not for these other groups" for this violates the essence of equal protection. If the government itself is the source of the potential due process violation, then it must act in a way that does not favor one group over another in safeguarding due process. To do otherwise would result in unequal treatment without a rational basis because there can be no "rational basis" that can be cited to support the government violating the Constitution.

**F.The Second,Third,and Fourth Causes of Action Should Not Be Dismissed**

1. The Second Cause of Action

A. Jurisdiction

The Court has jurisdiction to review a violation of the Settlement Agreement. Plaintiffs challenge the denial of Mr. Hajro's expedite request based, in part, on a violation of the Settlement Agreement. Defendants' argument

[17]For an example of such a case, see the declaration of Attorney Robert Pauw attached to the FAC as *Exhibit "S"*.

[18]i.e. FOIA requestors who can demonstrate that substantial due process rights of the requestor would be impaired by the failure to process immediately, and the information sought is not otherwise available.

based on FOIA, 5 U.S.C. § 552(a)(6)(E)(iv), is not applicable.

Plaintiffs also challenge the denial of Mr. Hajro's expedited request under FOIA in that the statute itself specifically allows an agency to provide for expedited processing in "other cases determined by the agency" 5 U.S.C. § 552(a)(6)(E)(i)(II) In this case, the agency augmented its bases for providing expedited processing by its agreement with Plaintiff Mayock to grant such treatment when a requestor demonstrates that substantial due process rights would by impaired by the failure to process immediately.

Judicial review of a denial of expedited processing is permitted under FOIA. 5 U.S.C. § 552(a)(6)(E)(iii). The (E)(iv) provision cited by Defendants only comes into play after the agency has provided a "complete" response to the request. Since the agency is unlawfully withholding the officer's notes, the response is not yet complete. As will be demonstrated in this brief, these notes are not wholly exempt from release and should be released expeditiously.

B. Mootness

If Defendants routinely complied with the statutory time constraints of FOIA, then the need for expedites would be largely eliminated or at least sharply reduced and this lawsuit might not be necessary. However, Defendants currently take many months to process FOIA requests. In situations where there is a deadline to file an application, a brief, or attend a hearing, persons who can demonstrate that substantial due process rights would be impaired

without access to documents in their own file before the deadline, present a claim which is "inherently transitory". The Ninth Circuit recognizes that such claims qualify for an exception to the mootness doctrine. *Wade v. Kirkland*, 118 F.3d 667 (9th Cir. 1997)

2. The Third and Fourth Causes of Action

Defendants routinely violate the statutory twenty day rule (5 U.S.C. §552(a)(6)(A)) and the statutory ten day extension rule due to "unusual circumstances" 5 U.S.C. §552(a)(6)(B). However, due to the time it takes to litigate such matters in federal court, by the time any court hears of these violations Defendants have produced their FOIA response and then claim mootness as they have done here. Such action should not be condoned by this Court for it allows the agency to escape review of longstanding and widespread violations of the statute. Such an escape hatch cannot be in the public interest.

The burden of establishing mootness rests on the party raising the issue, and it is a heavy burden. *County of L.A. v. Davis*, 440 U.S. 625, 631 (1979).

> ...the government cannot escape the pitfalls of litigation by simply giving in to a plaintiff's individual claim without renouncing the challenged policy, at least where there is a reasonable chance of the dispute arising again between the government and the same plaintiff. *Legal Assistance for Vietnamese Asylum Seekers v. Dept of State*, 74 F.3d 1308, 1311 (D.C. Cir. 1996)

Mr. Hajro has a hearing scheduled on October 22, 2009. If the government denies his second naturalization application after this hearing he will have to decide whether or not to appeal this denial to federal district court under

8 U.S.C. § 1421(c). According to Defendants, he will have 120 days to file a petition for review. 8 C.F.R. §336 .9(b). Thus time will be of the essence. If his naturalization application is denied after his hearing, he will file a request under FOIA for documents related to this hearing. This same timing dispute may then arise again between the government and the same plaintiff.

Furthermore, Plaintiffs are not merely challenging the handling of Mr. Hajro's case, but Defendants' policy of systemically violating the strict FOIA timing requirements. Defendants' inability to prove that they comply with FOIA's strict time requirements, and their policy of refusing to acknowledge their duty under the Settlement Agreement and their constitutional duty to expedite requests where the government itself is the cause of delay that threatens harm to substantial due process interests, precludes them from prevailing on mootness grounds. *Ukranian-American Bar Ass'n, Inc. v. Baker*, 893 F.2d 1374, 1377 (D.C. Cir. 1990) (where plaintiff attacks the government's policy, case is not moot even if individual subject to policy deported).

Although this is not a class action, both plaintiffs are affected by Defendants' pattern and practice of violating the time constraints of FOIA. The potential for future contacts with Defendants is high and there is a reasonable expectation that the alleged violation will recur. The potential for recurrent injury together with a public interest in having the legality of the practices settled militates against a mootness conclusion. *Etuk v. Slattery*, 936 F.2d

1433, 1441-42 (2d Cir. 1991)

**G. Plaintiffs' Sixth and Seventh Causes of Action Should Not Be Dismissed**

1. The Seventh Cause of Action

In the United States of America, can the government deny citizenship and then require that an appeal brief be filed and a hearing be held without giving the applicant access to the evidence upon which the denial is based[19]?

Mr. Hajro was denied naturalization based on alleged evidence supposedly in existence in his alien file as of October 9, 2007 (when his N-400 application was denied) which Defendants claim shows that he gave false testimony at his adjustment of status interview in November, 2000. Withholding the evidence relied upon by the government to deny his citizenship application violates his due process rights because it prevented Mr. Hajro's attorney from adequately preparing his brief on appeal.[20] The fact that Def. released part of the alien file before the brief was filed and also provided a Vaughn Index to Plaintiffs' counsel does not remedy this constitutional

[19]The Immigration & Nationality Act guarantees the right of aliens in removal proceedings "to have a reasonable opportunity to examine the evidence against the alien..." 8 U.S.C. § 1229a(b)(4)(B) Although the statute does not specifically grant this right to aliens in citizenship proceedings, Plaintiffs submit that permanent resident aliens applying for citizenship also have this right under the Fifth Amendment. To hold otherwise, would unduly burden the right to a hearing under 8 U.S.C.§1447(a).

[20]The hearing brief can be found at *Complaint Exhibit "Q"* p. 70-76 and sets forth a detailed exposition of the underlying dispute in this case.

violation, since the released documents contained no evidence proving that Mr. Hajro gave false testimony. As pointed out in ¶52 of the Complaint,

> In the 364 pages provided, the government has provided no evidence of this alleged testimony regarding foreign military service. Since the government has denied my client's application for naturalization based on this alleged testimony, one must assume that some evidence of this testimony exists in the file, otherwise the denial would be based on no evidence. For this reason, we are seeking all of the withheld material (78 pages in full, and 8 pages in part) to see if this withheld material contains any such evidence. In particular, we need to see the interviewing officer's notes taken at the interview on November 13, 2000. Reliance on any such "secret evidence" to deny my client's application for naturalization would be a violation of my client's constitutional right to Due Process. For this reason, if any evidence exists of this alleged testimony, it must be disclosed.
>
> We do not insist on the releasing of all withheld material under the following conditions: If the government determines that only some pages of the withheld material contains such evidence, we will accept these pages as long as the government confirms that no other such evidence exists. In the alternative, we will accept a written confirmation from the government that no such evidence exists in any of the withheld material.

Continued withholding of such evidence violates Mr. Hajro's right to a fair hearing and fundamental fairness. Mr. Hajro has a constitutional right to see the actual evidence relied upon by Defendants when they issued their decision on October 9, 2007.[21] Such a sacred right as citizenship should not be denied based on secret evidence, unless national security is involved, and there is no

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[21]Because Plaintiffs' counsel needed to see the actual evidence expeditiously to effectively represent his client in a written brief, this case, like the cases described in the declarations of Robert Pauw and Ruby Lieberman, illustrate examples where substantial due process rights would be impaired by the failure to process immediately, as is supposed to be protected under the terms of the Settlement Agreement.

such claim here. Furthermore, as will be explained in this brief, the withheld material is not wholly exempt from disclosure under FOIA.

2. The Sixth Cause of Action

A. Evidence of False Testimony:

Neither Mr. Hajro nor his wife who was present at the 2000 adjustment of status interview recall Mr. Hajro being specifically asked about foreign military service at the interview. Mr. Hajro has a constitutional right to see the actual evidence relied upon by Defendants when they issued their decision on October 9, 2007. Although the interviewing officer (Rose Marie Atkinson) signed a declaration on October 10, 2008 stating that it is her practice to ask this question, there is no concurrent evidence of this fact that has been provided. If any such evidence exists, it must be in the officer's interview notes taken contemporaneously at the interview. Contrary to Defendants claims, these notes are not wholly exempt from release under FOIA.

In the material contained in the partial release of Mr. Hajro's file prior to the writing of the hearing brief and the hearing itself, the only actual evidence related to the issue of false testimony was the written response to question Part 3(C) on Form I-485. *(Attachment 9)* This question reads as follows:

> List your present and past membership in or affiliation with every political organization, association, fund, foundation, party, club, society, or similar group in the United States or in any other place since your 18th birthday. Include any foreign military service in this part. If none, write "none". Include the name of organization, location, dates of membership from and to, and the nature of the

organization.

The applicant's written response to this question was "none". However, there is no indication anywhere on the application form or in the material provided to the applicant that he was ever actually and specifically asked at the interview about his foreign military service. The only evidence we have is that question 3(C) on Form I-485 was answered as "none" and circled, presumably by the immigration officer. However, this circle notation does not tell us if the words "foreign military service" were part of whatever the officer inquired about. There are many parts to the laundry list of items in question 3(C) which might or might not have been mentioned.

The circling of the word "none" hardly constitutes proof of false testimony[22] because he might not have ever been specifically asked about foreign military service or he might have misunderstood the question. Since the document provided (Form I-485) standing alone does not support Defendants' finding of false testimony, the supporting evidence (if any exists) must lie elsewhere. Although Defendants eventually produced the officer's declaration, this was created on October 10, 2008, a year after the initial denial. Even this

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[22]In order to constitute "false testimony" an inaccurate statement must be intentionally made with the subjective intent of obtaining an immigration benefit. *Kungys v. United States, 485 U.S. 759,779 (1988); U.S. v. Hovsepian*, 422 F. 3d 883, 887-89 (9th Cir. 2005) (*en banc*) (inaccurate statements on naturalization application or in testimony were not intentional or made to secure an immigration benefit and therefore did not constitute false testimony.) (*Exhibit F*) Furthermore, false statements made in an application are not included because "false testimony" only includes oral statements. *Kungys, supra*, at 780.

declaration does not state conclusively that the officer asked this question on the date in question. Instead, it relies on a claim of habit and was only created in response to litigation eight years after the actual interview. Mr. Hajro would like to see the actual evidence. That is only fair.

B. The Officer's Notes Are Not Wholly Exempt From Disclosure

The Officer's notes are not wholly exempt from disclosure. The law does not support Defendants' position that the officer's notes are exempt "in full" from disclosure under "the deliberative process privilege" (FOIA) 5 U.S.C. § 552(b)(5) and (PA) 5 U.S.C. §552a(d)(5); or "law enforcement records" (FOIA) 5 U.S.C. § 552(b)(7)(C) and (PA) 5 U.S.C. §552a(k)(2). See Def. MSJ p.7 fn.4 and Vaughn Index attached to Deiss decl., doc. 386. Defs' proffered justifications for withholding are not adequate to sustain their burden of proof under FOIA.

(1) The Deliberative Process Privilege

The deliberative process privilege protects advice, recommendations, and opinions which are part of the deliberative, consultative, decision-making processes of government. *NLRB v Sears Roebuck & Co.*, 421 U.S. 132, 150-154 (1975). The ultimate purpose of this privilege is to prevent injury to the quality of agency decisions. *NLRB*, at 151. Its particular purposes are (1) to encourage open, frank discussions on policy matters between subordinate and chief; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion by disclosure of reasons

and rationales that were not in fact the actual reasons for the agency's actions. *Coastal States Gas Corp. V. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

In construing the deliberative process privilege, the Supreme Court has recognized a distinction between "materials reflecting deliberative or policy-making processed on the one hand, and purely factual, investigative matters on the other. *EPA v. Mink*, 410 U.S. 73, 89 (1973). Thus, even if a document is predecisional, "the privilege applies only to the 'opinion' or 'recommendatory' portion of [a document], not to factual information which is contained in the document." *Coastal States*, at 867. See also *ITT World Comm. Inc. V. FCC*, 699 F.2d 1219, 1236 (D.C. Cir. 1983), *rev'd and remanded on other grounds*, 466 U.S.463 (1984).; *Playboy Enters.Inc. v. DOJ*, 677 F.2d 931,935 (D.C. Cir. 1982).

Generally, facts in a predecisional document must be segregated and disclosed unless they are "inextricably intertwined" with exempt portions. *Ryan v. Dep't of Justice*, 617 F. 2d 781, 790-91 (D.C. Cir. 1980). This procedure was codified by Congress in 1974 in the final paragraph of 5 U.S.C. §552(b).

Since none of the documents released thus far contain any pre-existing evidence that Mr. Hajro was actually read or asked Question Part 3C in its entirety at the interview or was specifically and actually asked about foreign military service, it is logical to assume that this proof, if it exists, would be found in the officer's contemporaneous notes of the interview. Mr. Hajro does not insist on the release of all of the officer's handwritten notes. He is only

seeking any contemporaneous evidence that Defendants might have that prove that he was asked about his foreign military service at the interview in 2000. This is a "fact" that is "reasonably segregable" from the rest of the notes[23].

It is difficult to perceive how the disclosure of such discrete purely factual information would result in a chilling effect upon the open and frank exchange of opinions within the agency, reveal the mental process of decision makers, or expose an agency's decision making process in such a way as to undermine the agency's ability to perform its functions.

(2) Law Enforcement Records

Plaintiffs only seek that portion of the officer's notes that have any notations related to Question Part 3(C) or foreign military service. The identity information, though already waived, is not an issue Plaintiffs wish to contest.

**CONCLUSION**

For the above stated reasons, Plaintiffs' motion for summary judgment should be granted and Defendants' motion for summary judgment should be denied.

Dated: October 5, 2009

Respectfully submitted,

_____/s/_____
KIP EVAN STEINBERG
Attorney for Plaintiffs

[23]If Defendants claim they are withholding factual material because such material is inextricably intertwined with exempt deliberative material, then Plaintiffs request that this Court conduct an *in camera* inspection of the officer's notes (Document 386). 5 U.S.C. § 552(a)(4)(B)

**LIST OF ATTACHMENTS**

1. Supplementary FOIA response letter dated July 31, 2008 (1)
2. FOIA receipt letter dated December 24, 2008 (simple track) (NRC Case 2008074591) (2-3)
3. FOIA response letter September 8, 2009 (NRC Case 2008074591) (4)
4. Declaration of James Mayock (5-7)
5. FOIA response letter for appeal that took almost four and half years (8-13)
6. Mirsad Hajro's FOIA response dated March 4, 2008 and DHS envelope postmarked March 24, 2008 (14-16)
7. Declarations of 26 immigration attorneys in alphabetical order:

James Bach (17-20)

Robert Baizer (21-23)

Angela Bean (24-28)

Judith Ann Bloomberg (29)

Sharon Dulberg (30-34)

Robert H. Gibbs (35-40)

Martha Ellen Friedberg (41)

Barbara N. Horn (42-57)

Daniel C. Horne (58-63)

Crisostomo G. Ibarra (64-70)

Martin J. Lawler (71-72)

Ruby Lieberman (73-85)

Shahpour Matloob (86-87)

Adria-Ann McMurray (88-92)

David Pasternak (93-98)

John Patrick Pratt (99-101)

Daniel Roemer (102-106)

C. Matthew Schulz (107-113)

Kirsten Schlenger (114-122)

Ilyce Shugall (123-126)

Jill Stanton (127-132)

Karyn Taylor (133-136)

Donald Ungar (137-139)

Justin Wang (140-145)

Rhoda Wilkinson Domingo (146-151)

Jon Wu (152-153)

8. Excerpt from Customs and Border Protection FOIA Reference Guide (Part VI) "Expedited Processing" (154-155)

http://www.cbp.gov/xp/cgov/admin/fl/foia/reference_guide.xml

9. Form I-485 Part 3(C) (156)