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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' REPLY TO PLAINTIFFS' OPPOSITION AND OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT** Hearing Date: October 27, 2009 Time: 10:00 a.m.

Plaintiffs bring nine causes of action against Defendants seeking relief under the Freedom of Information Act (FOIA) and the Administrative Procedure Act (APA). Defendants moved for summary judgment on August 10, 2009. On October 5, 2009, Plaintiffs opposed and cross-moved for summary judgement.[1] Defendants hereby oppose Plaintiffs' cross-motion for

[1]Defendants believe that hearing the parties' cross-motions on the same October 27, 2009 hearing date makes the most sense in terms of efficiency, even though Plaintiffs' October 5, 2009 cross-motion is not in accordance with Civil Local Rule 7-2.

summary judgment and reply to Plaintiffs' Opposition. Defendants are entitled to a judgment as a matter of law.

A. Plaintiff Mayock Lacks Standing.

Plaintiffs seem to argue that because Mayock had standing in another action where he brought a pattern and practice challenge, he has standing here. Pl. Mot at 2. In Mayock v. Nelson, 938 F.2d 1006 (9th Cir. 1991), Plaintiff Mayock, who is an immigration attorney, originally brought suit on behalf of aliens he represented. The issues regarding those plaintiffs were resolved and Mayock then proceeded on his own behalf, alleging a pattern and practice of (1) failing to produce certain categories of FOIA information and (2) failing to comply with FOIA requests within the statutory, ten-day period. That case was remanded to the district court for further fact finding. Here, Mayock does not represent Plaintiff Hajro and never made a FOIA request on his behalf.[2] To the extent, Plaintiff Mayock is arguing that he has standing because he was a party to the 1992 Settlement Agreement, he has not articulated any harm and should be dismissed. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).[3]

B. USCIS is the Only Proper Defendant.

To the extent Plaintiffs raise FOIA claims, only the agency USCIS is the proper Defendant here. See 5 U.S.C. § 552(f)(1) (in a FOIA claim, the only proper defendants are various government departments, government corporations, and executive branch entities). To the extent

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[2]Plaintiff Mayock attached to his declaration in support of his motion for summary judgment a single letter from USCIS to a colleague at his firm dated August 21, 2009 to support his claim that USCIS does not timely respond to FOIA requests. This is insufficient to establish a pattern or practice claim against USCIS.

[3]Further, it is well-settled that "[t]he interpretation of a settlement agreement is governed by principles of state contract law[,] ... even where a federal cause of action is 'settled' or 'released.'" Botefur v. City of Eagle Point, 7 F.3d 152, 156 (9th Cir. 1993) (citations omitted). Therefore enforcement of the Settlement Agreement is subject the relevant statute of limitations. See Johnson v. Georgia-Pacific Corp., 260 Fed. Appx. 994, 997 (9th Cir. 2007) (citing Wetzel v. Lou Ehlers Cadillac Group Long Term Disability Ins. Program, 222 F.3d 643, 646 (9th Cir. 2000)). The applicable statute of limitations for a written contract under California state law is four years. Cal. Civ. Pro. § 337. Thus the statute of limitations for any action regarding a 1992 Agreement ran in 1994.

Plaintiffs raise claims under the APA, USCIS remains the proper defendant. See 5 U.S.C. § 703 (judicial review of an agency's action "may be brought against the United States, the agency by its official title, or the appropriate officer.") All other defendants should be dismissed.

C. Plaintiffs Have Not Established a Pattern and Practice of not Responding to Plaintiff Hajro's FOIA Requests in a Timely Manner.

Plaintiffs assert that they have presented "substantial and uncontroverted evidence that lengthy delays are systematic and prejudicial to effective legal representation." Pl. Mot at 5. As an initial matter, the 26 declarations provided by Plaintiffs in support of their motion are from immigration attorneys who are not party to this action and it is unclear what purpose they serve. Further, the letters attached to the declarations only show the date of FOIA request and the date of response and the exemptions invoked. There is no context and this evidence is insufficient to establish a pattern and practice claim.

Here, there is no evidence of a pattern of unreasonable delay in Defendant USCIS's FOIA responses to Plaintiff Hajro, the only plaintiff who actually made a FOIA request. Again, Plaintiff Hajro made his FOIA request on November 7, 2007. Am Compl., ¶¶ 3, 40-42; Eggleston Decl., ¶¶5, 7; Nelson Decl. ¶ 7. Less than 20 days later, on November 19, 2007, Defendant USCIS denied Plaintiff Hajro's request for expedited processing because "it did not satisfy the criteria set forth for such consideration under the FOIA, 5 U.S.C. § 552(a)(6)(e)(v), and DHS's implementing regulation found at 6 C.F.R. § 5.5(d)." Am. Compl., ¶¶ 44-45; Eggelston Decl., ¶ 6. Plaintiff Hajro was also advised that the FOIA request would be processed in the Track II, complex track, and would require more than 20 days to process. Am. Compl., ¶¶20, 45-46; Eggleston Decl., ¶6.

Plaintiff Hajro appealed the denial of his expedited processing request, and on March 21, 2008, his administrative appeal was denied as the agency determined that Hajro "had not demonstrated that his request warranted expedited treatment pursuant to the standard set by 6 C.F.R. § 5.5(d)." Eggleston Decl., ¶¶ 8-9. Meanwhile, on March 4, 2008, USCIS sent out the responsive, nonexempt, reasonably segregable portions of his alien file to Hajro. Am. Compl., ¶¶ 50-51; Eggleston Decl., ¶ 9-11. USCIS's FOIA determination provided for the release of 356

pages of responsive documents in full and eight pages in part; 78 pages were withheld in full. Eggleston Decl.¶ 11; Deiss Decl., Exhibit 1. On May 12, 2008, Plaintiff Hajro administratively appealed the FOIA response. Am. Complaint, ¶ 52. On July 31, 2008, USCIS released an additional 12 pages of documents of additional the 13 found to be responsive to Hajro's FOIA request. Eggleston Decl., ¶ 13. There is no evidence of a pattern and practice of delay here.

D. The Settlement Agreement is Superceded By the FOIA Statute.

Plaintiffs argue that the 1992 Settlement Agreement was not superceded by statute even though in 1996, four years after the 1992 Settlement Agreement, Congress amended the FOIA to provide for "expedited processing" of certain categories of requests. See Electronic Freedom of Information Amendments of 1996, Pub. L. 104-231, § 8 (codified at 5 U.S.C. § 552(a)(6)(E)) ("EFOIA"). Pl. Mot at 5-10. Plaintiff argue that because the new FOIA statute did not provide for expedition when there is a "due process" impairment alleged, that provision of the Settlement Agreement still stands as do the Department of Justice 1992 policies. Pl. Mot at 6-7. As stated in Defendants' motion for summary judgment, if Congress had intend for the due process language to be included in the statute, it would have included it. See 5 U.S.C. § 552(a)(6)(E).

Plaintiffs appears to complain that Plaintiff Mayock never received a notice from Congress about the termination of the Settlement Agreement, but also concedes that there is no basis for such an argument. Pl. Mot at 9. Plaintiffs refer the Court to Paragraph 11 of the Settlement Agreement, but fail to recognize that settlement agreement are essentially contract law and any breach of contract claims raised now would need to establish jurisdiction. See footnote 3, supra.

E. Track Three is Exempt from Notice and Comment.

Plaintiffs cite to 5 U.S.C. § 552(a)(6)(E), which provides that each agency shall promulgate regulations regarding expediting pursuant to notice and receipt of public comment to support his argument that Track violates the APA and FOIA because it did not go through the formal notice and comment. Pl. Mot at 11-12. Again, Track III is not a regulation and is exempt from notice and comment. Further, the agency properly promulgated 6 C.F.R. § 5.5(d), a regulation

addressing expediting FOIA requests, in accordance with the APA.[4]

F. Plaintiffs' Equal Protection Claim Should be Dismissed Because Plaintiffs Do Not Allege Membership in a Burdened Group or Purposeful Discrimination.

Plaintiffs argue that the Track III policy "violates the Fifth Amendment guarantee of Equal Protection under the United States Constitution." Pl. Mot. at 14; Am. Compl., Eighth Cause of Action. Plaintiffs argues that the Track III 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 the members of one class are in removal proceedings." Am. Compl., ¶ 73. Plaintiffs have not alleged a colorable equal protection claim.

The Equal Protection Clause of the Fourteenth Amendment commands that no state shall "deny to any person within its jurisdiction the equal protection of the laws," which amounts to a direction that all persons who are similarly situated should be treated alike. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985). The equal protection component of the Fifth

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[4]In footnote 15 of Plaintiffs' Motion they state that they also "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.'" Pl. Mot at 13, n.15. To the extent Plaintiffs' Amended Complaint can be construed as raising this claim, it is simply incorrect. The relevant portion of 68 F.R. 4056 called for written comments by February 26, 2003, directed the Associate general Counsel of the Department of Homeland Security. The notice explains the issuance of an interim final rule:

> Because the DHS came into existence on January 24, 2003, it is necessary to promptly establish procedures to facilitate the interaction of the public with the Department. Furthermore, this Interim Final Rule generally parallels the procedures currently used by other agencies to implement the Freedom of Information Act and the Privacy Act. Accordingly the Department has determined that notice and public procedure are impracticable, unnecessary and contrary to the public interest pursuant to 5 U.S.C. 553(b)(B). For the same reasons, the Department has determined that this interim rule should be issued without a delayed effective date pursuant to 5 U.S.C. 553 (d)(3).
>
> Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. Chapter 6) do not apply. It has been determined that this rulemaking is not a significant regulatory action for the purposes of Executive Order 12866. Accordingly, a regulatory impact analysis is not required.

68 F.R. 4056.

Amendment's Due Process Clause imposes a similar obligation on the federal government. High Tech Gays v. Defense Indus. Security Clearance Office, 895 F.2d 563, 570-71 (9th Cir. 1990).

In order to maintain an equal protection claim, plaintiffs must identify membership in a classification or group whose rights have been burdened by defendants' discriminatory application of the law, or whose rights are differently burdened than those of other groups. Freeman v. City of Santa Ana, 68 F.3d 1180, 1187 (9th Cir.1995). Even assuming the Plaintiff Hajro can claim he is a member of a burdened group, aliens, neither plaintiff has alleged that he is a victim of any purposeful discrimination. The Eighth Cause of Action should be dismissed.

G. The Court is Precluded from Reviewing Expedited Processing Request.

Plaintiff Hajro continues to be frustrated by the agency's determination that he did not establish a basis for expedition. Pl. Mot at 6-7. The agency determined that Plaintiff Hajro, who is not in removal proceedings, did not present a compelling need for expedition. Again, the merits of that decision not to expedite someone's FOIA request is not reviewable by this Court.

FOIA unequivocally states that "[a] district court of the United States shall not have jurisdiction to review an agency denial of expedited processing of a request for records after the agency has provided a complete response to the request." 5 U.S .C. § 552(a)(6)(E)(iv) (emphasis added). As previously noted, USCIS has provided Plaintiff Hajro with all of the information in his FOIA request, except for exempt records. Thus, because USCIS has "provided a complete response" to Plaintiff Hajro's request, "this Court no longer has subject matter jurisdiction over the claim that [USCIS] failed to expedite processing of plaintiff's request." See Judicial Watch, Inc. v. United States Naval Observatory, 160 F.Supp.2d 111, 112 (D.C.C. 2001); see also Citizens for Responsibility & Ethics in Washington v. Dep't of Justice, 535 F.Supp.2d 157, 160 (D.C.C. 2008) (reasoning, based upon 5 U.S.C. § 552(a)(6)(E)(iv), that because defendant had "completed processing" plaintiff's request, "claim for failure to grant expedited processing[ ]" was "moot"); Al-Fayed v. C.I.A., 254 F.3d 300, 301 n. 1 (D.C. Cir. 2001) (citing to § 552(a)(6)(E)(iv), the Court found that the agencies which had "completed processing plaintiffs' underlying document requests[ ]" were "no longer subject to appeal[ ]"). Thus, in conducting, as it must, a de novo review of Plaintiff Hajro's denial of his request for expedited processing, see

e.g., Gerstein v. CIA, 2006 WL 3462658, at *4 (N.D. Cal. 2006) (internal quotation marks and citation omitted), this Court should have little difficulty finding that it lacks jurisdiction to entertain Plaintiff Hajro's claim that USCIS improperly denied him expedited processing of his FOIA request.

H. Plaintiff Hajro's FOIA Claims Are Moot.

Plaintiff Hajro's FOIA claims should be dismissed. See Papa v. United States, 281 F.3d 1004, 1013 (9th Cir. 2002) (recognizing that the production of all nonexempt documents, "however belatedly," moots a FOIA claim) (internal quotation marks omitted); Yonemoto v. Dep't of Veteran Affairs, 305 F. App'x 333, 334 (9th Cir. 2008) (same).

Plaintiff asserts that if his second application for naturalization is denied, he will file a FOIA request for documents relating to that decision, and therefore his FOIA claims are not moot. Pl Mot at 18. Any such claim is hypothetical and not ripe for review. Plaintiff's mere attestation that he might make another FOIA request in the future is insufficient to show a likelihood of recurrence. Sample v. Johnson, 771 F.2d 1335, 1343 (9th Cir. 1985) (citing Preiser v. Newkirk, 422 U.S. 395, 402-03 (1975)). In short, if there is no objectively demonstrable basis for concluding that any future recurrence of the challenged conduct will affect Plaintiff Hajro, there is no present case or controversy. Id. at 1340; see also Rizzo v. Goode, 423 U.S. 362 (1976) (no more than hypothetical possibility that plaintiffs' individual rights would be violated by unconstitutional police action in future).

Defendants recognize that the United States Supreme Court has stated that, "[e]ven when an agency does not deny a FOIA request outright, the requesting party may still be able to claim 'improper' withholding by alleging that the agency has responded in an inadequate manner." U.S. Dep't of Justice v. Tax Analysts, 492 U.S. 136, 151 n. 12 (1989). As discussed further below, it is USCIS's position that all nonexempt, segregable records were given to Plaintiff Hajro and there have been no FOIA violations.

I. USCIS Has Not Unlawfully Withheld Records.

FOIA requires that government agencies disclose to the public any requested documents. 5 U.S.C. § 552(a). The agency may avoid disclosure only if it proves that the documents fall

within one of nine enumerated exemptions. 5 U.S.C. § 552(b)(1)-(9). FOIA's purpose is to encourage disclosure, and to that end, its exemptions are to be interpreted narrowly. U.S. Dept. of Justice v. Julian, 486 U.S. 1, 8 (1988). The government has the burden to prove that a requested document falls within one of FOIA's exemptions. 5 U.S.C. § 552(a)(3).

Plaintiffs challenge primarily USCIS's invocation of exemption "(b)(5)". Pl. Mot at 23-25. FOIA exempts disclosure of the "deliberative process" under 5 U.S.C. § 552(b)(5). Lahr v. NTSB, 569 F.3d 964, 979-980 (9th Cir. 2009) (citing Assembly of Cal. v. U.S. Dep't of Commerce, 968 F.2d 916, 919 (9th Cir. 1992)).

The Ninth Circuit has created a two-prong analysis to determine if a document falls into the deliberative process exemption. Assembly of Cal., 968 F.2d at 920; recently adopted in Lahr, 569 F.3d at 979-980. In order to fall within this exemption, a document must be both "pre-decisional" and "deliberative." Id. A document is pre-decisional where it reflects the impressions of the drafter and is used to assist agency decision making. Assembly of Cal., 968 F.2d at 920. The deliberative prong is met where requiring such disclosure would expose the decision-making process and threaten candid opinions. Id. at 919 (recognizing the Congressional intent as encouraging frank deliberation without fear of public scrutiny (citing Rep. No. 813, 89th Cong., 1st Sess. 9 (1965)).

Plaintiff Hajro requests notes taken by an officer during his naturalization interview. These handwritten notes consist of the officer's impressions of the interview to be used in determining whether or not to grant Plaintiff's application for naturalization. Requiring such disclosure would expose the officer's candid thought process. Knowledge that such notes could become subject to public scrutiny could stifle agency employee participation. Thus, Plaintiff's request was properly withheld.

J. This Court Lacks Jurisdiction to Review the Denial of Naturalization Here.

Plaintiff complains at length about the basis for denying Plaintiff Hajro's naturalization application. Pl. Mot at 19-21. Plaintiff Hajro asserts, it seems, that he could not properly challenge the denial because he was not informed as to what the basis of the denial was. Pl Mot. at 19. That is not accurate and the reason is, as relayed by Plaintiffs, because he provided false

testimony. Pl. Mot at 21-22. Any challenge to the denial of naturalization here would be properly brought in a 8 U.S.C. § 1421(c) action, which is not the subject of this litigation.

K. Conclusion

The Court should grant Defendants' Motion for Summary Judgment.

Dated: October 13, 2009

Respectfully submitted,

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/s/
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