

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;
MICHAEL B. MUKASEY, Attorney General
Department of Justice,

Defendants.

No. C 08-1350 PVT

DEFENDANTS' NOTICE AND MOTION
TO DISMISS IN PART

Hearing Date: February 10, 2009
Time: 10:00 a.m.

PLEASE TAKE NOTICE that the federal Defendants will move this Court on **February 10, 2009 at 10:00 a.m.** in Courtroom 5, United States Federal Building, 280 S. First Street, San Jose, California, before the Honorable Patricia V. Trumbull, U.S. Magistrate Judge, for an Order dismissing Plaintiffs' First Amended Complaint In Part pursuant to Fed. R. Civ. P. 12(b)(1), and/or Fed. R. Civ. P. 12(b)(6).

This motion is based on this notice, the memorandum of points and authorities, all the matters of record filed with the Court, and such other evidence as may be submitted.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs bring nine causes of action against Defendants seeking relief under the Freedom of Information Act (FOIA) and the Administrative Procedure Act (APA).¹ Amended Complaint, ¶¶ 58-76. Plaintiffs ask this Court to “order production of agency records related to Plaintiff Hajro”. Amended Complaint at 1-2. Plaintiffs also seek “injunctive relief to enforce the strict time requirements under FOIA” and “to enforce the terms of a nationwide settlement agreement related to FOIA . . .” Id. Defendants hereby move to dismiss the Amended Complaint in part for lack of subject matter jurisdiction, lack of standing, and failure to state a claim upon which relief can be granted.

II. FACTS

Plaintiff Hajro is a legal permanent resident who applied for naturalization in 2003 and was denied in 2007. Amended Complaint, ¶¶ 31-39. On November 19, 2007, Plaintiff Hajro made an expedited request under the FOIA with the Department of Homeland Security (DHS), requesting a copy of his alien registration file. Amended Complaint, ¶ 40-42. That same day, Defendant U.S. Citizenship and Immigration Services (USCIS), a component of DHS, denied Plaintiff Hajro’s request for expedited processing. Id., ¶¶ 44-45. Plaintiff Hajro appealed, and on March 27, 2008, his administrative appeal was denied. That same day, he received a complete response to his FOIA request. Id., ¶¶ 50-51. On May 12, 2008 Plaintiff Hajro administratively appealed the FOIA response. Id., ¶ 52. On May 13, 2008 Plaintiff Hajro filed a brief in his administrative appeal of the denial of his naturalization application. Id., ¶ 55.

Plaintiff James R. Mayock is an immigration attorney in San Francisco. Amended Complaint, ¶ 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). Amended Complaint, ¶ 17. As a result of the litigation in that case, Plaintiff Mayock entered into a

¹Plaintiffs also invoke the Declaratory Judgment Act, 28 U.S.C. § 2201, 2202. Amended Complaint, ¶ 10.

1 Settlement Agreement with the former Immigration and Naturalization Service (INS). Amended
 2 Complaint, ¶ 18; Exh. A (hereinafter referred to as “the 1992 Settlement Agreement” or “the
 3 Settlement Agreement”). Under the 1992 Settlement Agreement, there is a provision for
 4 “Expedited Processing for Demonstrated Exceptional Need or Urgency” of FOIA requests and
 5 “Procedures for Expedited Processing.” Amended Complaint, ¶ 19.

6 **III. LEGAL STANDARDS**

7 **A. Dismissal under Federal Rule of Civil Procedure 12(b)(1)**

8 Dismissal is appropriate under Rule 12(b)(1) when the district court lacks subject matter
 9 jurisdiction over the claim. Fed. R. Civ. P. 12(b)(1). Federal subject matter jurisdiction must exist
 10 at the time the action is commenced. Morongo Band of Mission Indians v. Cal. State Bd. of
 11 Equalization, 858 F.2d 1376, 1380 (9th Cir. 1988), cert. denied, 488 U.S. 1006 (1989). A Rule
 12 12(b)(1) motion may either attack the sufficiency of the pleadings to establish federal jurisdiction,
 13 or allege an actual lack of jurisdiction which exists despite the formal sufficiency of the complaint.
 14 Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp., 594 F.2d 730, 733 (9th Cir. 1979); Roberts v.
 15 Corrothers, 812 F.2d 1173, 1177 (9th Cir. 1987).

16 Subject matter jurisdiction is a threshold issue which goes to the power of the court to hear the
 17 case. Therefore, a Rule 12(b)(1) challenge should be decided before other grounds for dismissal,
 18 because they will become moot if dismissal is granted. Alvares v. Erickson, 514 F.2d 156, 160
 19 (9th Cir.), cert. denied, 423 U.S. 874 (1975).

20 **B. Dismissal under Federal Rule of Civil Procedure 12(b)(6)**

21 A complaint must contain a “short and plain statement of the claim showing that the pleader is
 22 entitled to relief.” Fed. R. Civ. P. 8(a). When considering a motion to dismiss under Rule
 23 12(b)(6) for failure to state a claim, dismissal is appropriate only when the complaint does not give
 24 the defendant fair notice of a legally cognizable claim and the grounds on which it rests. See Bell
 25 Atl. Corp. v. Twombly, --- U.S. ---, 127 S.Ct. 1955, 1964 (2007). In considering whether the
 26 complaint is sufficient to state a claim, the court will take all material allegations as true and
 27 construe them in the light most favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d 896,
 28 898 (9th Cir. 1986).

1 **IV. ARGUMENT**

2 **A. The 1992 Settlement Agreement was Superseded By Statute in 1996.**

3 Plaintiffs ask this Court to enforce the 1992 Settlement Agreement. Amended Complaint,
 4 Prayer ¶ A, B, C, D. Plaintiffs allege that Defendants' multi-track policy for processing FOIA
 5 requests "violates the Settlement Agreement" because "they do not provide a requestor for
 6 expedited processing an opportunity to demonstrate that substantial due process rights would be
 7 impaired by the failure to process immediately, and the information sought is not otherwise
 8 available." Amended Complaint, ¶¶ 58-61. Plaintiffs also allege that Defendants' denial of
 9 Plaintiff Hajro's November 2007 request for expedited processing of his FOIA request "violated
 10 the Settlement Agreement." Amended Complaint, ¶ 62. This Court cannot enforce the 1992
 11 Settlement Agreement because it has been superseded by statute.

12 Congress enacted the FOIA in 1966 to grant a right of public access to governmental
 13 information "long shielded unnecessarily from public view" and authorized judicial enforcement
 14 of that right against "possibly unwilling official hands." EPA v. Mink, 410 U.S. 73, 80 (1973),
 15 superseded by statute, Freedom of Information Act, Pub.L. No. 93-502, § 2(a), 88 Stat. 1563
 16 (1973).

17 Agencies ordinarily process FOIA requests for agency records on a first-in, first-out basis.
 18 In 1996, four years after the 1992 Settlement Agreement, Congress amended the FOIA to provide
 19 for "expedited processing" of certain categories of requests. See Electronic Freedom of
 20 Information Amendments of 1996, Pub. L. 104-231, § 8 (codified at 5 U.S.C. § 552(a)(6)(E))
 21 ("EFOIA"). Expedition, when granted, entitles requestors to move immediately to the front of an
 22 agency processing queue, ahead of requests filed previously by other persons.

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

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

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

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

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

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

The standard for reviewing agency decisions to deny expedition depends on the ground for decision. As noted above, an agency may grant expedition “in cases in which the person requesting the records demonstrates a compelling need,” 5 U.S.C. § 552(a)(6)(E)(i)(I), or “in other cases determined by the agency.” Id. § 552(a)(6)(E)(i)(II); see also Al-Fayed, 254 F.3d at 307 n.7 (noting this latter provision gives agencies “‘latitude to expand the criteria for expedited access’ beyond cases of ‘compelling need’”) (quoting H.R. Rep. No. 104-795, at 26). A decision denying expedited processing for failure to establish “compelling need” under Section

1 552(a)(6)(E)(i)(I) is reviewed de novo. See Al-Fayed, 254 F.3d at 308. A decision denying
 2 expedited processing for failure to meet criteria established by an agency under Section
 3 552(a)(6)(E)(i)(II) is reviewed under a more deferential “reasonableness” standard. See Al-
 4 Fayed, 254 F.3d at 307 n.7 (noting that, “to the extent [the agency FOIA] regulations expand the
 5 criteria for expedited processing beyond ‘compelling need,’ the agencies reasonably determined
 6 that plaintiffs’ requests did not meet the expanded criteria”).

7 Further, on March 1, 2003, the Immigration and Nationality Service (“INS”) was dissolved and
 8 reconstituted as the Department of Homeland Security (“DHS”). DHS’s implementing regulations
 9 mirror EFOIA’s expedited processing directives. See 6 C.F.R. § 5.5(d).² The regulations also
 10 provide that generally, requests are processed in their order of receipt. 6 C.F.R. § 5.5(a). The
 11 regulations also provide guidance as to what needs to be presented for expedited processing and
 12 for an administrative appeal of the denial of a request to expedite. 6 C.F.R. § 5.5(d)(3),(4).

13 Hence, any denial of a request to expedite, for whatever reason, is subject to review
 14 administratively and to judicial review under the 1996 EFOIA amendments, not the 1992
 15 Settlement Agreement. Enforcement of the 1992 Settlement Agreement is outside the bounds of
 16 this Court’s jurisdiction as it has been superseded by statutes and regulations that guide the
 17 agencies. Further, to the extent Plaintiffs might seek to use the APA as a vehicle to challenge
 18 DHS’ processing of FOIA requests, that would impermissible as the EFOIA itself provides an
 19 adequate remedy for Plaintiffs’ claims and separate APA review is not available. See 5 U.S.C. §
 20 703 (APA review available “except to the extent that prior, adequate, and exclusive opportunity
 21

22 ²6 C.F.R. § 5.5(d)(1) reads:

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

- 25 (i) Circumstances in which the lack of expedited treatment could
 26 reasonably be expected to pose an imminent threat to the life or physical
 27 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 for judicial review is provided by law”); 5 U.S.C. § 704 (APA review of actions “for which there
 2 is no other adequate remedy in a court . . .”). “Congress did not intend the general grant of review
 3 in the APA to duplicate existing procedures for review of agency action.” Bowen v.
 4 Massachusetts, 487 U.S. 879, 903 (1988).

5 Therefore, the First Cause of Action and the Second Causes of Action and any request to
 6 enforce the 1992 Settlement Agreement must be dismissed for failure to state a claim upon which
 7 relief can be granted.

8 **B. Plaintiff Mayock Lacks Standing.**

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

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

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

28 It is true that a plaintiff may bring an independent claim alleging “a pattern and practice of

unreasonable delay in responding to FOIA requests.” Liverman v. Office of the Inspector Gen., 139 Fed. Appx. 942, 944 (10th Cir. 2005); see also Payne Enters., Inc. v. United States, 837 F.2d 486, 494 (D.C. Cir. 1988). The plaintiff, however, still needs to be the requester and establish an injury or standing requirements would be improperly circumvented. Being an immigration attorney who has made at some time of over the years several FOIA requests on behalf of his clients, Amended Complaint, ¶16, is insufficient to establish standing here.³

Plaintiff Mayock has not established standing to bring any part of this action and should be dismissed as a Plaintiff.

C. The Ninth Cause of Action Should be Dismissed as Baseless

Plaintiffs allege that Defendants violated the APA when they implemented “Track Three” by failing to provide a notice and comment period. Amended Complaint, ¶ 74-76.

As aptly discussed in the Plaintiffs’ complaint, on February 28, 2007, Defendant USCIS announced a third processing track for individuals who were in removal proceedings before immigration judges, with an effective date of March 30, 2007. Amended Complaint, ¶ 22; Exh. C.

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 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, id. at § 553(c); and (3) publishing the adopted rule not less than thirty days before its effective date, with certain exceptions that are not applicable here, id. at § 553(d). Here, USCIS published the notice on February 28, 2007 in the Federal Register and provided 30 days for comment before becoming

³Defendants recognize that previously Plaintiff Mayock was found to have standing to challenge the former INS’ failure to timely respond to his clients’ FOIA requests. Mayock v. Nelson, 938 F.2d 1006, 1007 n. 1 (9th Cir. 1991). Plaintiff Mayock makes no similar allegation 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 practice” claim under FOIA Department of Energy concerning delay in responding to *his* requests) (emphasis added).

1 effective on March 30, 2007. See 72 Fed Reg. 9017 (2/28/07).

2 Therefore, any allegation that the APA was violated by failing to provide a notice and
3 comment period should be dismissed as baseless. See Neitzke v. Williams, 490 U.S. 319, 327
4 (1989) (a trial court can dismiss those claims whose factual contentions are clearly baseless).⁴

5 **D. All FOIA Claims Against Government Defendants Other Than the USCIS Should be
6 Dismissed for Lack of Jurisdiction**

7 In actions arising under FOIA, the only proper defendants are federal departments and
8 agencies. See 5 U.S.C. § 552(a); Lawrence v. Comm'r of Internal Revenue, 2000 WL 637351, at
9 *1 (C.D. Cal. Mar. 2, 2000) (citing Thompson v. Walbran, 990 F.2d 403, 405 (8th Cir. 1993);
10 Petrus v. Bowen, 833 F.2d 581, 582 (5th Cir. 1987)). "Individual officers of federal agencies are
11 not proper parties to a FOIA action." Lawrence, 2000 WL 637351, at *1.

12 USCIS is a component of DHS, a federal agency, and is therefore a proper Defendant for
13 Plaintiffs' FOIA claims. See 5 U.S.C. § 552. The remaining Defendants are officers of USCIS or
14 are the Attorney General of the United States and are not proper Defendants. See Lawrence, 2000
15 WL 637351, at *1. The court therefore should dismiss all of Plaintiffs' FOIA claims against all
16 Defendants except USCIS.

17 **E. The Court Should Dismiss Defendant Mukasey**

18 The proper defendants in an APA action are the United States, the government agency that
19 took the action for which review is sought, or the appropriate officer of such agency. See 5 U.S.C.
20 § 703. Therefore, because the DHS, not the U.S. Department of Justice, is the agency responsible
21 for implementing the Immigration and Nationality Act and is the agency at issue, Defendant U.S.
22 Attorney General Michael Mukasey should be dismissed from this action. 5 U.S.C.A. § 706;
23 Homeland Security Act of 2002, §§ 451(b)(5); see also Kousar v. Mueller, 549 F. Supp.2d 1194,
24 1997 (N.D. Cal. 2008).

25 ⁴Further, "an individual may not raise an FOIA claim based on an agency's failure to
26 publish a rule or regulation, unless he makes an 'initial showing' that 'he was adversely affected
27 by the lack of publication....'" Mada-Luna v. Fitzpatrick, 813 F.2d 1006, 1018 (9th Cir. 1987).
28 As a threshold matter, Plaintiffs have not demonstrated that they were "adversely affected" by the
alleged lack of publication, and so cannot state a claim under § 553. Zaharakis v. Heckler, 744
F.2d 711, 714 (9th Cir. 1984).

V. CONCLUSION

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

Dated: January 5, 2009

Respectfully submitted,

JOSEPH P. RUSSONIELLO
United States Attorney

/s/

ILA C. DEISS
Assistant United States Attorney
Attorneys for Defendant