

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

DEMOCRACY FORWARD FOUNDATION,
1333 H Street NW, Floor 11
Washington, DC 20005,

Plaintiff,

vs.

U.S. DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT,
451 7th Street, SW
Washington, DC 20410,

U.S. DEPARTMENT OF JUSTICE,
950 Pennsylvania Avenue, NW
Washington, DC 20230,

and

U.S. INTERAGENCY COUNCIL ON
HOMELESSNESS,
301 7th Street, SW
Washington, DC 20407,

Defendants.

Case No.

COMPLAINT FOR INJUNCTIVE RELIEF

1. Plaintiff, Democracy Forward Foundation (“Democracy Forward”), brings this action under the Freedom of Information Act, 5 U.S.C § 552 (“FOIA”), to compel the production of documents from Defendants, U.S. Department of Housing and Urban Development (“HUD”), U.S. Department of Justice (“DOJ”), and U.S. Interagency Council on Homelessness (“USICH”) (collectively, “Defendants”).

2. On July 2, 2019, HUD announced a Notice of Funding Availability (“NOFA”) titled “Specialized Housing and Services for Victims of Human Trafficking.” The NOFA was a

product of a partnership between HUD and DOJ meant to “address human trafficking that occurs within communities ... [and] to enhance the quality and quantity of safe housing and specialized services available to assist victims of human trafficking.” Through this program the Administration planned to make \$13,500,000 available for grants to eligible organizations to implement and provide housing and trauma-informed, victim-centered services to victims of human trafficking.

3. Applications were due by October 30, 2019. On August 22, 2019, HUD hosted a webinar through USICH for organizations interested in applying.

4. On September 4, 2019, HUD announced on its website that it updated the NOFA to allow “minor and adult foreign national victims” to be served under the program.

5. On September 9, 2019—five days after making non-citizens eligible to be served under the program—the grant was cancelled without explanation. Sometime after September 13, 2019, the grant’s status was changed from “cancelled” to “postponed.”

6. As of November 5, 2019, HUD’s website continues to identify this funding opportunity as postponed. The Administration has not explained why it halted the funding opportunity, much less how it would otherwise provide housing services for victims of human trafficking.

7. On September 16, 2019, Democracy Forward submitted one FOIA request to each Defendant requesting records that would clarify the reasons that the Administration suddenly, and inexplicably, cancelled and then supposedly postponed the NOFA.

8. To date, Defendants have not complied with their obligations under the FOIA.

9. Accordingly, Democracy Forward seeks an injunction directing Defendants to comply with FOIA and to search for and produce all responsive documents.

JURISDICTION AND VENUE

10. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

11. Venue is proper under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

PARTIES

12. Plaintiff Democracy Forward is a not-for-profit media organization incorporated under the laws of the District of Columbia and based in Washington, D.C. Democracy Forward's work includes the promotion of transparency and accountability in government by educating the public on government actions and policies. Among other things, Democracy Forward posts information it receives from FOIA requests on the internet and writes about them in various media. Democracy Forward's FOIA investigations have led to numerous stories of significant public interest.

13. Defendant DOJ is a federal agency within the meaning of FOIA, 5 U.S.C. § 552(f)(1), and is headquartered in Washington, D.C.

14. Defendant HUD is a federal agency within the meaning of FOIA, 5 U.S.C. § 552(f)(1), and is headquartered in Washington, D.C.

15. Defendant USICH is a federal agency within the meaning of FOIA, 5 U.S.C. § 552(f)(1), and is headquartered in Washington, D.C.

FACTUAL ALLEGATIONS

16. Democracy Forward submitted one FOIA request to each agency on September 16, 2019. *See Exhibits A, B, C, attached hereto.*

17. Each request sought substantially the same records, specifically:

1. Any records, including interagency communications and communications with third-parties, discussing or addressing modification, postponement, or cancellation of the NOFA (FY 2019 Specialized Housing and Services for Victims of Human Trafficking Notice of Funding Availability).

2. Any records, including interagency communications and communications with third-parties, discussing the NOFA which contain the words “non-citizens,” “foreign national(s),” “minor and adult foreign national victims,” “immigrants,” “aliens,” or “illegals,” or any variants thereof.
3. Any records, including interagency communications and communications with third-parties, discussing the addition of minor and adult foreign national victims as eligible participants, as published on September 4, 2019.

18. The FOIA requests specified a timeframe for responsive records: July 2, 2019 to the date on which the agency completed its search for responsive documents.

19. The FOIA request to DOJ requested a “search for records within the following DOJ offices and personnel: Office of the Assistant Attorney General, Office of Justice Programs, and OVC (including Director Darlene Hutchinson Biehl).”

20. The FOIA request to HUD requested a “search for records within the following HUD offices and personnel: Office of the Secretary (including Secretary Ben Carson), Chief of Staff, Deputy Chiefs of Staff, Senior Advisors (including John Gibbs and John Ligon), Policy Development & Research, General Counsel, White House Liaison, Community Planning and Development (including Sherri Boyd), Congressional and Intergovernmental Relations, and Public Affairs.”

21. The FOIA request to USICH requested a “search for records, including but not limited to the records of Lindsay Knotts, USICH Policy Director and Rexanah Wyse, USICH Policy and Program Analyst.”

22. All three FOIA requests asked for a fee waiver on the ground that the subject of the requests concerned operations of the federal government, and the disclosures would likely contribute to a better understanding of these operations by the public in a significant way. *See* 5 U.S.C § 552(a)(4)(A)(iii).

HUD Response

23. On September 17, 2019, HUD FOIA staff acknowledged receipt of the FOIA request with an email. This email incorrectly treated the FOIA request as requesting expedited processing. It also stated, “to receive as soon as possible the Department’s FOIA response to your request for any records please send a modification to clarify your request via email to me that you are modifying to your request, to include the specific type of record you are requesting.” This acknowledgement email also stated that HUD would treat Democracy Forward as a media requester making the request for a fee waiver moot.

24. On September 19, 2019, undersigned counsel on behalf of Democracy Forward responded by email and clarified that Democracy Forward was not seeking expedited processing. This response also stated that “as for the type of record we are seeking, we can limit the request to email records along with their attachments. It is not necessary to conduct a search for hard copy records.” Counsel asked if that was a sufficient narrowing to begin the search and offered to discuss the matter further.

25. The same day, HUD staff replied by email, stating the following: “I must let you know that for the Department’s subject matter experts to conduct an email record search HUD employee first and last names are required to query the email searching system (eDiscovery).” This email also stated that the Department had “a significant backlog” of searches to conduct.

26. On September 23, 2019, Democracy Forward counsel responded by email:

We would be happy to work with HUD to identify a list of custodians to search, but it is not reasonable for HUD to expect us to identify all custodians without providing us more information about who was working on the project that is the subject of our FOIA request. We have identified a discrete topic about which we seek information---e.g. various records relating to the Notice of Funding Availability (NOFA) titled “Specialized Housing and Services for Victims of Human Trafficking Announcement” (CFDA Number 14.279). Our request also identifies the various HUD offices that should be searched. This is enough

information for HUD to meet its obligation under the FOIA to make "a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). We lack insight into HUD's operations, namely which staff worked on this NOFA, and therefore cannot identify the specific custodians most likely to have responsive records. The agency should be able to identify which staff worked on the NOFA, and is accordingly best positioned to identify potential custodians. Would you please let me know which custodians HUD proposed that it search?

27. Having received no response, on October 4, 2019, Democracy Forward counsel responded to this email chain asking for an update on the status of the identification of HUD custodians and the timing of the FOIA search.

28. HUD FOIA staff responded by email on October 8, 2019, again asking for the "HUD employee first and last names." This email stated that Democracy Forward could submit a separate FOIA request to determine custodians to search and that "[t]he FOIA does not require agencies to conduct research for requesters...".

29. On October 18, 2019, Democracy Forward counsel responded, explaining that HUD's interpretation of its responsibilities under the FOIA was legally incorrect, but that in the meantime (and without conceding any obligation to identify custodians), Democracy Forward would provide names of custodians to search. This email identified several individuals whose records should be searched in response to the FOIA request.

30. HUD FOIA staff confirmed these individuals by email on October 21, 2019. The agency has not provided any additional information regarding the timeframe for processing the FOIA request.

31. Democracy Forward has not received any other communications from HUD regarding this FOIA request or any responsive record.

DOJ Response

32. On September 17, 2019, DOJ Office of Information Policy sent a letter to Democracy Forward, stating that the FOIA request should be processed by the Office of Justice Programs (“OJP”) and that the request had been forwarded by the FOIA/Privacy Act Mail Referral Unit to OJP for processing and direct response.

33. On September 24, 2019, DOJ OJP sent a letter to Democracy Forward, stating that it had received the forwarded request on September 19, 2019. This letter also stated that the agency sought to extend the time limit to respond to the request beyond the ten additional days provided by the statute in “unusual circumstances.” 5 U.S.C. § 552(a)(6)(B)(i)-(iii). The letter also stated that the request had been assigned to the “complex” track. The letter also said they had yet to decide on the request for a fee waiver, but would not charge search fees based on the determination that Democracy Forward is a representative of the news media.

34. Democracy Forward has not received any subsequent communications from DOJ regarding this FOIA request or any responsive record.

USICH Response

35. Democracy Forward has not received any formal acknowledgement of its FOIA request from USICH.

36. Democracy Forward staff called USICH on September 25, 2019, and during the phone call USICH staff confirmed that the agency received the FOIA request, and that it would follow up with an acknowledgement letter. Democracy Forward has not received this letter.

37. On October 1, 2019, Democracy Forward staff called USICH but did not reach any employee.

38. On October 3, 2019, Democracy Forward staff again called USICH and failed to reach any employee. Democracy Forward was also unable to leave a voicemail as the voicemail system was not operating.

39. Democracy Forward has not received any other communications from USICH regarding this FOIA request or any responsive record.

40. Pursuant to 5 U.S.C. § 552(a)(6)(A)(i), Defendants were required to determine whether to comply with the FOIA request within twenty business days of receipt of the request and to notify Democracy Forward immediately of their determination, the reasons therefor, and the right to appeal any adverse determination. When there are “unusual circumstances,” Defendants may extend this deadline by ten working days, as provided in subsection 552(a)(6)(B)(iii).

41. Including the ten-day extension claimed by DOJ, all of the Defendants’ responses to the FOIA requests were due no later than November 1, 2019.

42. HUD has not produced any records in response to the FOIA request or advised Democracy Forward of any determination whether to comply with the FOIA request. HUD’s initial communications with Democracy Forward indicate that HUD does not intend to conduct a reasonable search in response to the FOIA request.

43. DOJ has not produced any records in response to the FOIA request or advised Democracy Forward of any determination whether to comply with the FOIA request.

44. USICH has not produced any records in response to the FOIA request or advised Democracy Forward of any determination whether to comply with the FOIA request.

45. Because Defendants failed to comply with the time limit set forth in 5 U.S.C. § 552(a)(6)(A)(i) and 5 U.S.C. § 552(a)(6)(B)(i), Democracy Forward is deemed to have exhausted any and all administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C).

CLAIM FOR RELIEF

46. Democracy Forward incorporates by reference the foregoing paragraphs as if fully set forth herein.

47. By failing to respond to Democracy Forward's request within the statutorily mandated time period, Defendants have violated their duties under FOIA, 5 U.S.C. § 552, including but not limited to their duties to conduct a reasonable search for responsive records, to take reasonable steps to release all reasonably segregable nonexempt information, and to not withhold responsive records.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Democracy Forward prays that this Court:

1. order Defendants to conduct a search for any and all responsive records to Democracy Forward's FOIA requests and demonstrate that they employed search methods reasonably likely to lead to discovery of all responsive records;
2. order Defendants to produce, by a date certain, any and all nonexempt responsive records and a *Vaughn* index of any responsive records withheld under a claim of exemption;
3. enjoin Defendants from continuing to withhold any and all nonexempt responsive records;
4. order Defendants to grant Democracy Forward's request for a fee waiver;

5. award Democracy Forward its attorneys' fees and other litigation costs reasonably incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and
6. grant Democracy Forward any other relief this Court deems appropriate.

Dated: November 5, 2019

Respectfully submitted,

/s/ Robin F. Thurston

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