UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, INC., Plaintiff, *v.* UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, Defendant.	**Case No.** 1:20-cv-04284-RWL

PLAINTIFF'S REPLY IN FURTHER SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

Finally addressing the merits of this dispute, USCIS acknowledges that WRAPS contains its agency records, effectively conceding it has no basis to refuse to search the database in response to IRAP's request for its client's refugee case file. According to USCIS, it nonetheless should prevail because the post-filing actions of a non-party prevent this Court from holding it to account. Yet USCIS's arguments on this front—dependent on a caricature of IRAP's complaint and a nonexistent exception to the FOIA's disclosure mandate—are no stronger than its merits arguments. The Court should grant IRAP partial summary judgment and enter the proposed order.

ARGUMENT

I. THE COURT SHOULD GRANT IRAP PARTIAL SUMMARY JUDGMENT

A. Because USCIS Excluded a Database Containing Responsive USCIS Agency Records, There Is No Genuine Dispute That USCIS's Search Was Inadequate

IRAP is entitled to judgment as a matter of law because there is no genuine dispute that USCIS failed to conduct an adequate search in response to IRAP's request for its client's refugee case file. The question for the Court on this motion for partial summary judgment is not—contrary to USCIS's suggestion—whether *all* records within WRAPS pertaining to refugees are USCIS agency records. *See* Def.'s Mem. of Law in Further Supp. of Mot. to Dismiss & in Opp'n to Pl.'s Mot. for Partial Summ. J. ("Def.'s Reply"), ECF No. 48, at 2, 14-21. Rather, the question is whether USCIS's refusal to search the WRAPS database violates the FOIA. *See* Pl.'s Mem. of Law in Supp. of Mot. for Partial Summ. J. & in Opp'n to Def.'s Mot. to Dismiss ("Pl.'s Br."), ECF No. 41, at 13-18; Pl.'s Proposed Order, ECF No. 41-1. This is not a "fact-intensive inquiry." *Contra* Def.'s Reply at 1. Forced to defend its search, USCIS now concedes that certain records pertaining to refugee adjudications within WRAPS are USCIS "agency records." *See* Def.'s Reply at 18 n.6. Based on this concession alone, there is no genuine dispute that USCIS's search, which

did not include WRAPS, was inadequate.

An agency violates the FOIA when it fails to conduct a search that is "reasonably calculated to discover the requested documents." *Grand Cent. P'ship v. Cuomo*, 166 F.3d 473, 489 (2d Cir. 1999) (internal quotation marks omitted). A search that excludes locations likely to contain responsive records is inadequate as a matter of law. *See Fox News Network, LLC v. Bd. of Governors of the Fed. Rsrv. Sys*., 601 F.3d 158, 159-60 (2d Cir. 2010); *NAACP Legal Def. & Educ. Fund, Inc. v. Dep't of Just.*, 463 F. Supp. 3d 474, 484, 488-489 (S.D.N.Y. 2020). There is no genuine dispute that USCIS's search was inadequate: In response to IRAP's request for its client's refugee case file, *see* Pl.'s Rule 56.1 Statement of Undisputed Facts, ECF No. 45 *and* Def.'s Resp. to Pl.'s Statement, ECF No. 52 (together "SUF") ¶¶ 73-74, 81, USCIS produced no records and refused to search WRAPS, *see* SUF ¶¶ 77, 82, 85, 88, 92, 94, a database likely to contain responsive records. As USCIS acknowledges, WRAPS stores the information USCIS requires to decide a refugee applicant's case and the records of USCIS's decisionmaking—precisely the documents IRAP requested with respect to its client. *See* SUF ¶¶ 36-41; Pl.'s Br. at 16 (setting out IRAP's understanding of the term "refugee case file").

USCIS cannot justify its refusal to search WRAPS on the ground that these records are not USCIS "agency records." As IRAP explained in its opening brief, there is no genuine dispute that they are. *See* Pl.'s Br. at 15-18. Faced with the evidence, USCIS has abandoned its position "that USCIS does not have the legal authority or ability to search and produce records from WRAPS" and "that records within WRAPS are not USCIS agency records." *See* Joint Letter dated Aug. 24, 2020, ECF No. 18, at 2. Indeed, USCIS now concedes that "records that USCIS creates" and "records generated on USCIS forms" that are located in WRAPS are, in fact, USCIS agency

records. *See* Def.'s Reply at 18 n.6.[1]

The purported factual dispute that USCIS raises is immaterial. *See* Def.'s Reply at 16-22. USCIS hangs its hat on evidence that, in addition to housing the records of refugee adjudications, WRAPS contains a small handful of other types of documents that USCIS officers would not typically consult. *See* Def.'s Reply at 17, 19 (citing Suppl. Ingraham Decl. ¶ 12, ECF No. 50; Ruppel Decl. ¶ 5, ECF No. 49); *see also id.* at 22 (citing records "that . . . would not typically be accessed by USCIS during its refugee adjudication process"). But the fact that WRAPS may contain some other documents that are not responsive to IRAP's request (whether because they are not relevant or are not "agency records") does not render USCIS's refusal to search WRAPS reasonable: either way, there is no genuine dispute that WRAPS contains responsive records for which USCIS is required to search. The Court should enter IRAP's proposed order.

B. Declaratory Relief Is Warranted Because USCIS Is Committed to an Unlawful Policy or Practice of Refusing to Search WRAPS

USCIS's objection to the remedy IRAP requests—which echoes its contention that the Court may not reach the merits at all—is also misplaced. *See* Def.'s Reply at 8-16, 21-22. The decision whether to grant declaratory relief is within a district court's discretion. *See* 28 U.S.C. § 2201(a). In the Second Circuit, courts consider "(1) whether the judgment will serve a useful

[1] To the extent USCIS suggests that records on which USCIS relies for adjudication but which are not *also* "generated on USCIS forms"—such as results of security and background checks, *see* SUF ¶¶ 37-40—are not USCIS agency records, USCIS cannot carry its burden. In its analysis, *see* Def.'s Reply at 18-20, USCIS fails to engage with Second Circuit law and cites a standard that the Second Circuit has not adopted. *See, e.g.*, *Doyle v. U.S. Dep't of Homeland Sec.*, 959 F.3d 72, 77 (2d Cir. 2020) (characterizing the standard as the D.C. Circuit's "own control test"). In any case, as to these documents, the D.C. Circuit standard would yield at best for USCIS an "indeterminate" result that would favor IRAP as the requester given the applicable burden. *See Jud. Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 220, 233 (D.C. Cir. 2013). The Court need not, however, reach these issues to conclude that USCIS's search was inadequate and order the requested relief, since USCIS now concedes that many relevant records in WRAPS are USCIS agency records.

purpose in clarifying or settling the legal issues involved; and (2) whether a judgment would finalize the controversy and offer relief from uncertainty." *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 411 F.3d 384, 389 (2d Cir. 2005). Declaratory relief may be appropriate in, among other settings, "a challenge to an allegedly illegal agency policy and the future implementation of that policy." *Doyle v. U.S. Dep't of Homeland Sec.*, 331 F. Supp. 3d 27, 66-67 (S.D.N.Y. 2018), *aff'd*, 959 F.3d 72 (2d Cir. 2020) (internal quotation marks omitted).

Declaratory relief is warranted here because this case concerns USCIS's violation of the FOIA through its policy or practice of refusing to search WRAPS in response to refugee case file requests. IRAP has not been coy about what it considers to be the stakes of this suit. *See, e.g.*, Compl. ¶ 1, ECF No. 1 ("*This case challenges the policy* of Defendant [USCIS] . . . of claiming . . . that it has no records of the refugee resettlement applications that it adjudicates. USCIS's policy is unlawful under the FOIA . . . ." (emphasis added)); Pl.'s Br. at 12-13 (citing these and dozens of other allegations); Joint Letter dated Aug. 24, 2020, at 2 (explaining that this case "involves a recurring issue" for IRAP); SUF ¶¶ 58-94. Nor has USCIS, for its part, ever asserted that it is not USCIS's policy or practice to refuse to search WRAPS in response to FOIA requests; rather USCIS has spent this litigation seeking to protect its ability to continue to do so, one way or another. *See, e.g.*, Joint Letter dated Aug. 24, 2020, at 2 ("USCIS does not have the legal authority or ability to search and produce records from WRAPS"); Def.'s Mem. of Law in Supp. of Mot. to Dismiss, ECF No. 36, at 5 (acknowledging failure to search WRAPS was deliberate); Def.'s Reply at 12-14, 16-21 (never denying that USCIS refuses and will continue to refuse to search WRAPS for its agency records and arguing the Court should deny IRAP's motion on the merits). Declaratory relief will settle this consequential legal dispute.

USCIS ignores dozens of relevant allegations and facts to contend that this case does not

challenge a policy or practice. *Compare* Def.'s Reply 8-14, 21-22 *with* Pl.'s Br. at 12-13 & n.4[2]; SUF ¶¶ 58-94. USCIS argues that IRAP's pleading is deficient because in the claim for relief, IRAP seeks the production of documents with respect to a particular request. *See* Def.'s Reply at 8-11. But what distinguishes a policy or practice claim is not whether it centers on specific improperly withheld records, which any claim under the FOIA does. *See U.S. Dep't of Just. v. Tax Analysts*, 492 U.S. 136, 142 (1989) (setting out the elements of a FOIA claim). What distinguishes a policy or practice claim is whether the "agency's refusal to supply information evidences a policy or practice of . . . some . . . failure to abide by the terms of the FOIA," as opposed to "merely isolated mistakes by agency officials." *Payne Enters., Inc. v. United States*, 837 F.2d 486, 491 (D.C. Cir. 1998). A court is to consider whether the plaintiff, "in addition to seeking documents[,] . . . also alleged that the [defendant] was following an impermissible practice in evaluating FOIA requests, and that it will suffer continuing injury due to this practice." *Newport Aeronautical Sales v. Dep't of Air Force*, 684 F.3d 160, 164 (D.C. Cir. 2012) (internal quotation marks omitted). IRAP has amply done so here. *See* Pl.'s Br. at 12-13.[3]

USCIS's further suggestions that IRAP faces no continuing injury because, in USCIS's view, IRAP can sue the State Department instead and because USCIS "will cease to harm IRAP

[2] USCIS indirectly acknowledges the relevance of many of the allegations in its response to IRAP's Rule 56.1 Statement, asserting that numerous undisputed facts that mirror the allegations are "irrelevant" solely "because the complaint [supposedly] does not assert a FOIA 'pattern or practice' claim." *Compare, e.g.*, SUF ¶¶ 58-63 *with* Compl. ¶¶ 1-2, 9-10, 30-31.

[3] Citing D.C. District Court cases, USCIS contends that IRAP was also required to allege multiple FOIA violations. *See* Def.'s Reply at 10-11. Even if alleging multiple violations were the only way to plausibly allege an unlawful policy or practice (which it is not), IRAP would satisfy the requirement: IRAP alleged that USCIS conducted inadequate searches on multiple occasions, repeatedly refusing to include WRAPS notwithstanding IRAP's explicit requests that it do so. *See Muttitt v. U.S. Cent. Command*, 813 F. Supp. 2d 221, 230-31 (D.D.C. 2011) (counting each failure to provide an adequate response); Compl. ¶¶ 37-53 (citing letters bearing various control numbers); *see also* SUF ¶¶ 58-94 (detailing multiple submissions to, and responses from, USCIS).

by the end of the year" misconstrue the law and again ignore the allegations and facts. Def.'s Reply at 12-14, 21-22. USCIS may not wash its hands of its independent statutory obligations through de facto delegation, and its attempts to do so have impeded and will continue to impede IRAP's rightful access to information, even setting aside the failings of USCIS's purported delegee. *See Brennan Ctr. for Just. v. U.S. Dep't of State*, 300 F. Supp. 3d 540, 549 (S.D.N.Y. 2018) (emphasizing that the agency that receives a request "is ultimately responsible" even when, unlike here, it does make a formal referral); Compl. ¶¶ 54-56 (describing the State Department's years-long silence); Stein Decl. ¶¶ 5-7, ECF No. 37 (same). Moreover, IRAP routinely files FOIA requests for refugee case files. *See* Pl.'s Br. at 12; SUF ¶¶ 58-60, 70-71. Thus, a possibility of a change in eight months cannot extinguish the harm to IRAP from USCIS's continuing violation of a law that requires USCIS to produce responsive records "promptly." 5 U.S.C. § 552(a)(3)(A); *see id.* § 552(a)(6)(A)(i) (agency must determine within 20 business days whether to comply). Declaratory relief is warranted and the Court should enter the proposed order.

II. THERE IS NO OBSTACLE TO REACHING THE MERITS

Though USCIS insists otherwise, there is no obstacle to reaching the merits. *Contra* Def.'s Reply at 3-16; *see generally* Pl.'s Br. at 7-13. Conspicuously absent from USCIS's brief is any reference to the question at the core of the mootness analysis and on which USCIS bears a heavy burden: that is, whether the Court can "grant any effectual relief whatever" to IRAP. *Knox v. Serv. Emps. Int'l Union, Local 100*, 567 U.S. 298, 307 (2012) (internal quotation marks omitted); *see also Chafin v. Chafin*, 568 U.S. 165, 172 (2013) ("As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." (internal quotation marks omitted)); Pl.'s Br. 7-8. The Court can, in fact, grant IRAP effectual relief: The Court can require USCIS to search for and produce records from WRAPS in response to IRAP's request which, thus far, USCIS has refused to do. *See* 5 U.S.C. § 552(a)(4)(B); *see also N.Y. Times Co. v.*

U.S. Dep't of Just., 762 F.3d 233, 237 (2d Cir. 2014) (illustrating courts' power to order a FOIA defendant to produce a *Vaughn* index describing withheld materials).[4] Once USCIS has conducted its search and produced responsive records, the Court can address any remaining disputes regarding, for example, the propriety of any claimed bases for withholdings. *See* 5 U.S.C. § 552(a)(4)(B). And the Court can declare USCIS's actions unlawful and thus discourage USCIS from harming IRAP in response both to this request and to other pending and future requests. *See id.*; 28 U.S.C. § 2201(a).

USCIS's arguments that the Court may not reach the merits are unavailing. In addition to contending, baselessly, that this case does not challenge an unlawful policy or practice, *see supra* Part I.B., USCIS claims for itself a nonexistent exception to the FOIA: according to USCIS, the mere fact that another agency has "processed" a request directed to that agency—no matter what the agency has produced—absolves USCIS of its duty to respond to a request directed at USCIS. *See* Def.'s Reply at 3-7, 15. This argument ignores the FOIA's text and underlying congressional determinations and goes far further even than the nonbinding cases USCIS cites.

As IRAP has explained, there is no exception to the FOIA's disclosure requirement for records produced by another agency. *See* Pl.'s Br. 8-10. Under Congress's scheme, "each agency" has a responsibility to respond to "any request" with only narrow, exclusive exceptions, none of which is disclosure by another agency. 5 U.S.C. § 552(a)(3)(A); *see Tax Analysts*, 492 U.S. at 150-53. In enacting the FOIA, Congress sought to cabin agency discretion, departing resolutely from a process that had been "full of loopholes which allow[ed] agencies to deny legitimate

[4] Given the scope of its request, IRAP is skeptical that it would "strain" agency resources for USCIS to answer it. *See* Def.'s Reply at 5. That said, in the interest of efficiency and obtaining judicial review quickly, IRAP would not object to USCIS adopting, if it deems appropriate following an adequate search and its own review, some or all of the State Department's production and claimed withholdings as a component of its response.

information to the public." S. Rep. No. 89-813, at 38 (1965) (rejecting a "good cause" standard for withholding). When Congress created exceptions for previously disclosed records, it did so only for materials "previously published or made available by the *agency itself*," and only for specifically delineated types of materials at that. *Tax Analysts*, 492 U.S. at 152-53 (citing 5 U.S.C. § 552(a)(1)-(2)). The potential "redundancies," of which "Congress undoubtedly was aware," were balanced against an interest in providing clear, "definitive guidelines" that on the whole would promote "full agency disclosure." *Id.* at 150-53; S. Rep. No. 89-813, at 38.

As IRAP also previously explained, this case is not moot for the additional reason that, even if the State Department's production were relevant, IRAP has not received everything it requested. *See* Pl.'s Br. at 10-11.[5] USCIS's suggestion that this case is moot because the State Department has "processed" IRAP's request to that agency, *see* Def.'s Reply at 3, is belied even by the cases that USCIS cites. *See also* Pl.'s Br. at 11 (distinguishing other cited cases). In *Boyd v. Executive Office for U.S. Attorneys*, 87 F. Supp. 3d 58 (D.D.C. 2015), the Court addressed all the plaintiff's claims on their merits. These included the claim that the agency's decision to withhold certain records under Exemption 7(C) violated the FOIA—even though the plaintiff had previously requested the same records, the agency had previously withheld the records on the same ground, and the D.C. Circuit had previously addressed the validity of that withholding. *See id.* at 74-78 (ultimately following the D.C. Circuit's ruling); *see also id.* at 67, 87-89 (permitting another agency to rest on its previous FOIA response when records had "'been subject to *the full process* contemplated by the FOIA,'" including judicial review (emphasis added)). In *UtahAmerican*

[5] Contrary to USCIS's unsupported assertion, *see* Def.'s Reply at 6 n.3, IRAP does not "concede" that the State Department produced "its client's entire file" because the State Department did no such thing. To the extent USCIS believes this is relevant to mootness on its erroneous theory, USCIS has not carried its burden.

Energy, Inc. v. Department of Labor, 685 F.3d 1118 (D.C. Cir. 2012), the Court acknowledged the existence of independent FOIA obligations that might lead "multiple components of the same agency [to] withhold the same documents on the same grounds" and reversed the district court judgment on comity, not mootness, grounds. *Id.* at 1124-25.

USCIS's appeal to comity here, *see* Def.'s Reply at 5-7, is misdirected. IRAP does not seek to litigate any request to the State Department: it seeks to enforce its rights with respect to USCIS. If USCIS's speculation about separate and conflicting lawsuits ever materialized, any conflict would be addressed through generally applicable principles of judicial deference and docket management, not by denying the existence of underlying legal rights. *See, e.g.*, *UtahAmerican Energy*, 685 F.3d at 1124-25.

USCIS's approach would set a dangerous precedent by giving agencies a new excuse to withhold records and new way to evade judicial review, frustrating Congress's purpose of promoting full agency disclosure. S. Rep. No. 110-59, at 3-4 (2007) (recognizing "lax FOIA enforcement by federal agencies" and agencies' "incentive to delay compliance with FOIA requests until just before a court decision that is favorable to a FOIA requester"). Here, disregarding USCIS's unique obligations to IRAP would have meaningful practical implications for IRAP's access to information, even beyond the continuing effects of USCIS's policy or practice, *see supra* Part I.B. For example, IRAP would be denied an adequate search that is likely to yield, among other things, records regarding its client's still-pending refugee application that were generated after the State Department's response. *See* Pl.'s Br. at 10. And it would be deprived of the considerable information—including at least the entirety of three documents and sections of dozens of others—that remains withheld not only by USCIS but also by the State Department, unless and until it could reach summary judgment in a new federal suit. *See* SUF

¶¶ 95-97. *Contra* Def.'s Reply at 5 (contending it is IRAP's position that would create "waste"); *see also* Poellot Decl. ¶ 22, ECF No. 43 (before responding to the request after IRAP sued USCIS, the State Department reported that it did not expect to respond until September 21, 2022). USCIS appears to think these details are inconsequential. *See, e.g.*, Def.'s Reply at 3 ("IRAP has received all of the requested records"); *id.* at 5 (claiming "no appreciable gain" to IRAP from this suit). Far from it: the FOIA is a "disclosure statute," not a "withholding statute," *Milner v. Dep't of Navy*, 562 U.S. 562, 565 (2011) (internal quotation marks omitted), timing of access matters, *see* 5 U.S.C. § 552(a)(3)(A), and it is not the agency's place to dictate the response with which the requester ought to be satisfied, *see Bloomberg, L.P. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 601 F.3d 143, 147 (2d Cir. 2010) (courts give "no deference" to an agency's position on what may be withheld).

Because the State Department's production is not relevant, because IRAP has not received all that it requested, and because this case challenges a policy or practice (or for any one of these reasons), there is no obstacle to this Court reaching the merits.

CONCLUSION

The Court can and should grant IRAP partial summary judgment and enter the proposed order. In the interim, the Court should consider referring this case for a judicial settlement conference. *See* Local Civ. Rule 83.9(f). USCIS's belated concession that many of the records IRAP requested are in fact USCIS agency records suggests that the parties may no longer be so sharply at odds. *See also* Exec. Order No. 14,013 § 4(n), 86 Fed. Reg. 8839, 8843 (Feb. 4, 2021) (requiring the Department of Homeland Security and the State Department to develop plans to improve access to refugee case files "on an expedited basis to inform timely appeals from adverse decisions").

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Respectfully submitted,

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