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 COMBINED MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS UNDER RULE 12(b)(1)

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Plaintiff the International Refugee Assistance Project, Inc. ("IRAP") submits this memorandum of law in support of its motion for partial summary judgment and in opposition to the motion to dismiss under Rule 12(b)(1), ECF No. 29, of Defendant U.S. Citizenship and Immigration Services ("USCIS").

INTRODUCTION

Plaintiff IRAP provides legal services to people seeking to resettle in the United States as refugees, including people whose refugee applications Defendant USCIS has initially denied. Because USCIS conveys its decisions on a checkbox form and affords applicants no alternative mechanism for obtaining more information from USCIS, IRAP routinely requests USCIS's records pertaining to its clients through the Freedom of Information Act ("FOIA"). USCIS refuses to produce these records under the FOIA, taking the position that refugee case files are not its "agency records" because of the database in which they are stored.

Unable to access records from USCIS through the administrative process, IRAP brought suit to obtain a judicial ruling requiring USCIS to comply with its obligations under the FOIA. The parties agreed to file cross-motions for summary judgment and the court ordered a summary judgment briefing schedule. But now, even as USCIS continues to refuse to produce any documents and to insist that it is complying with the law, USCIS seeks to avoid judicial review. In a motion to dismiss under Rule 12(b)(1), USCIS argues that this case is moot because, after IRAP filed suit, a different agency responding to a different FOIA request produced copies of some (and not all) of the records IRAP requested.

For multiple reasons, USCIS cannot carry its burden of proving mootness: Congress was clear that an agency's obligations to a requester under the FOIA exist and persist regardless of the actions of any other agency; USCIS concedes that IRAP does not have all of the records it requested; and USCIS's practice of refusing to make its records available is a recurring problem

for IRAP that the Court has the power to remedy. On the merits, USCIS likewise cannot carry its burden under the FOIA to justify its refusal to produce the records IRAP requested. The Court should deny USCIS's motion to dismiss and grant partial summary judgment in IRAP's favor.

BACKGROUND

I. THE ROLE OF USCIS IN REFUGEE RESETTLEMENT

Defendant USCIS, a sub-agency of the U.S. Department of Homeland Security ("DHS"), is charged by Congress with the responsibility for deciding applications for refugee status. *See* Pl.'s Rule 56.1 Statement of Undisputed Facts ("SUF") ¶¶ 1-4.[1] This work encompasses, among other things, deciding what information an applicant must submit to be considered for resettlement, conducting security checks, interviewing the applicant, determining whether the applicant is eligible to resettle in the United States, and ultimately deciding whether, in the agency's discretion, to grant the application. *See id.* ¶¶ 2-9, 47-49. USCIS does not provide for appeals but does permit a person whose application is denied to request, within 90 days of USCIS's decision, that USCIS review the decision. *See id.* ¶¶ 13-15. USCIS staff participate in refugee adjudications from around the world. *See id.* ¶ 45.

USCIS relies on several partners to help it manage the refugee application process. Entities like the U.N. High Commissioner for Refugees screen and refer prospective applicants. *See* SUF ¶¶ 16-17. Other government agencies like the Federal Bureau of Investigation help conduct background checks. *See id.* ¶ 19. Nongovernmental and other organizations help applicants complete their application forms and assemble supporting evidence. *See id.* ¶ 18. The Refugee Processing Center, which is operated by the private company Development InfoStructure, Inc.

[1] Under U.S. law, people deemed by the President to be of "special humanitarian concern to the United States" may apply to resettle in the United States as refugees. 8 U.S.C. § 1157(a)(3), (c)(1). As a general matter, a person is a refugee if they have been persecuted, or have a well-founded fear of persecution, in their country of origin. *See* 8 U.S.C. § 1101(a)(42).

(also known as "Devis") under a contract with the U.S. Department of State (or "State Department"), maintains the electronic refugee case files. *See id.* ¶¶ 21-23. The IT system through which the Refugee Processing Center maintains these case files is called the Worldwide Refugee Admissions Processing System ("WRAPS"). *See id.* ¶ 24. By using a shared, centralized document management system for its adjudication of refugee cases, USCIS can easily gather, store, and review information from multiple and disparate sources. *See id.* ¶ 27, 47-49. WRAPS also enables USCIS to coordinate its adjudications among its staff, *see id.* ¶¶ 27, 42-51; through WRAPS, USCIS personnel can access and examine a refugee case file from any place, at any time, *see id*. ¶¶ 42-45.

II. THE IMPORTANCE OF RECORDS ACCESS UNDER THE FREEDOM OF INFORMATION ACT

With limited, exclusive exceptions, the Freedom of Information Act requires "each agency," "upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules," to "make the records promptly available to any person." 5 U.S.C. § 552(a)(3)(A); *see also U.S. Dep't of Just. v. Tax Analysts*, 492 U.S. 136, 150-51 (1989) (discussing narrowly defined exceptions). Congress enacted the law "to advance a general philosophy of full agency disclosure," *Grand Cent. P'ship v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999) (internal quotation marks omitted), recognizing that "[t]he effective functioning of a free government . . . calls for the widest public understanding of the quality of government service rendered by all . . . public officials or employees," OPEN Government Act of 2007, Pub. L. No. 110-175, § 2(1)(C), 121 Stat. 2524, 2524 (quoting *Barr v. Matteo*, 360 U.S. 564, 577 (1959) (Black, J., concurring)). Courts have an important role in enforcing the FOIA: In a suit by a requestor against an agency for violation of the Act, a district court has the power "to enjoin the agency from withholding agency records and to order the production of any agency records

improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B). Federal court review is *de novo*, and the court may examine agency records *in camera* to determine the validity of any withholdings by the agency. *See id.*

Congress provided for access to records under the FOIA based on a principle of "right to know," not "need to know." § 2(6), 121 Stat. at 2524-25. Refugee applicants, however, have a right to and a need for the prompt and full access to agency records that the FOIA promises. If a person is granted refugee status, USCIS's records of the refugee application remain relevant to the agency's adjudication of any subsequent applications for benefits, including U.S. citizenship. *See Nightingale v. USCIS*, --- F. Supp. 3d ---, No. 19-cv-03512-WHO, 2020 WL 7640547, at *3 (N.D. Cal. Dec. 17, 2020) (recognizing the importance of records of past interactions with DHS for later applications), *appeal filed* No. 21-15288 (9th Cir. Feb. 18, 2021). If a person is denied refugee status—a decision USCIS conveys through an opaque checkbox form—USCIS's records can be the key to understanding the agency's reasoning and the aspects of the application with which the agency has found fault. *See* SUF ¶ 11. In either case, the FOIA is applicants' exclusive means of accessing the records. *See id.* ¶¶ 11-12. And in fact, USCIS invites FOIA requests: in its Privacy Impact Assessment for Refugee Case Processing and Security Vetting,[2] USCIS represents that individuals—including "refugee applicants located abroad"—may obtain their information by filing a request with USCIS. *See id.* ¶¶ 61-62.

III. THE FAILURE OF USCIS TO PRODUCE ITS RECORDS

Plaintiff IRAP is a non-profit organization that, among other things, provides direct legal

[2] According to DHS, a Privacy Impact Assessment, among other things, "notifies the public . . . [w]hat Personally Identifiable Information (PII) DHS is collecting; [w]hy the PII is being collected; and [h]ow the PII will be collected, used, accessed, shared, safeguarded and stored." *Privacy Impact Assessments*, U.S. Dep't of Homeland Sec., https://www.dhs.gov/privacy-impact-assessments (last updated Nov. 25, 2020).

services to refugees going through USCIS's application process. *See* SUF ¶ 58. One component of IRAP's direct legal services work is helping people request review of USCIS decisions denying their refugee applications. *See id.* ¶ 59. When representing someone in a request for review to USCIS, IRAP generally also requests that USCIS produce its client's case file under the FOIA to better inform its advocacy on behalf of that client. *See id.* ¶ 60.

Contrary to its public representations that applicants abroad may access their records from USCIS through the FOIA, when those applicants make FOIA requests, USCIS produces no records, refusing to search the one database—WRAPS—where it keeps them. *See* SUF ¶¶ 28, 63. USCIS takes the position that requesters' exclusive recourse is through the State Department. *See id.* ¶ 65. The State Department, for its part, often refers requesters back to USCIS and, if it does respond substantively, takes years to complete even its initial search. *See id.* ¶¶ 66-67.

Beginning in February 2018, IRAP made multiple administrative submissions and appeals seeking USCIS's records pertaining to a client whose refugee application USCIS denied, and specifically requested that USCIS search the WRAPS database. *See* SUF ¶¶ 72-93. Throughout the administrative process, which lasted over a year, USCIS claimed that it had identified no responsive records. *See id.* ¶¶ 77, 82, 85, 88, 92. Though USCIS never stated during this process whether it had searched WRAPS, it eventually advised, "We believe the records you are seeking would be under the purview of the U.S. Department of State." *See id.* ¶ 89. USCIS has since admitted that it did not search WRAPS. *See id.* ¶ 94.

IRAP filed this suit in June 2020 to obtain an order declaring that USCIS violated the FOIA when it refused to search WRAPS for records responsive to IRAP's request; enjoining USCIS from withholding its records; and requiring USCIS to search for and produce refugee case file documents in WRAPS. *See* Compl., Prayer for Relief, ECF No. 1. The day the parties' case

management plan was due, USCIS reported that, in response to a separate FOIA request not at issue here, the State Department, a nonparty, had released records to IRAP earlier in the day. *See* Joint Letter dated Aug. 24, 2020, ECF No. 18, at 2. USCIS asserted that this development "moot[ed] Plaintiff's lawsuit against USCIS" and at the same time jointly proposed with IRAP that, absent settlement, the case be resolved on cross-motions for summary judgment. *Id.* at 2-3. The Court ordered the parties' proposed summary judgment briefing schedule. *See* Order dated Aug. 25, 2020, ECF No. 19, at 3.

Two days before USCIS's deadline to move for summary judgment, USCIS sought to adjourn summary judgment briefing because it had recently "discovered" that the State Department "inadvertently did not process the entire WRAPS file." Def.'s Letter dated Dec. 7, 2020, ECF No. 25, at 2. The Court declined to suspend summary judgment briefing outright as USCIS had requested and instead extended USCIS's deadline to move for summary judgment. *See* Order dated Dec. 8, 2020, ECF No. 27, at 4. The day its summary judgment motion was due, USCIS filed a motion to dismiss under Rule 12(b)(1), citing a production of documents by the State Department the previous week. *See* Def.'s Mem. of Law in Supp. of Mot. to Dismiss ("Def.'s Br."), ECF No. 36, at 6, 8. To date, even as it argues that this case is moot, USCIS has produced no records and continues to maintain that it has satisfied its legal obligations under the FOIA. *See* Declaration of Terri White ("White Decl.") ¶ 12, ECF No. 38 ("USCIS has in good faith conducted a search reasonably calculated to identify records responsive to Plaintiff's FOIA request."); *see also* Joint Letter dated Aug. 24, 2020, ECF No. 18, at 2 (USCIS asserting it "has fulfilled its obligations under FOIA").

ARGUMENT

These cross-motions present two questions: first, whether USCIS has carried its burden on its motion to dismiss IRAP's case as moot by pointing to the partial production of records by

another agency in response to a different FOIA request; and second, whether USCIS can demonstrate that refugee case files are not USCIS records and thus need not be produced under the FOIA. The answer to both questions is no. The Court should deny USCIS's motion to dismiss and grant partial summary judgment in IRAP's favor.

I. THIS CASE IS NOT MOOT

This case is not moot. "A case becomes moot only when it is impossible for the court to grant any effectual relief whatever to the prevailing party." *Knox v. Serv. Emps. Int'l Union, Local 100*, 567 U.S. 298, 307 (2012) (internal quotation marks omitted). Here, IRAP has brought suit seeking an order declaring USCIS's refusal to search WRAPS to be unlawful, enjoining USCIS from withholding records, and requiring USCIS to produce records wrongfully withheld. *See* Compl., Prayer for Relief, ECF No. 1. USCIS continues to refuse to produce any records and to maintain that it has complied with the FOIA. The statute, which provides that the district court "has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant," plainly gives the Court the power to grant IRAP the relief it seeks. *See* 5 U.S.C. § 552(a)(4)(B); *see also* 28 U.S.C. § 2201 (authorizing courts to "declare the rights and legal relations of any interested party" "[i]n a case of actual controversy within its jurisdiction").

Contending that the State Department's production of documents moots this case, *see* Def.'s Br. at 1, USCIS falls well short of satisfying its "heavy burden" for multiple reasons, any one of which would preclude dismissal of this case. *Michigan v. Long*, 463 U.S. 1032, 1042 n.8 (1983) ("we have held that the party who alleges that a controversy before us has become moot has the 'heavy burden' of establishing that we lack jurisdiction" (quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979))); *see also Mhany Mgmt., Inc. v. County of Nassau*, 819 F.3d

581, 603 (2d Cir. 2016) ("the burden of showing mootness logically falls on a defendant because, by the time mootness is an issue, the case has been brought and litigated" (internal quotation marks omitted)). *Contra* Def.'s Br. at 7 (suggesting wrongly that IRAP bears any burden on mootness).

A. The State Department's Response to a Different Request Is Irrelevant

First, IRAP has yet to receive any records at all from USCIS in response to its request; under the FOIA, the actions of the State Department, a different agency, in response to a different request are not relevant. The statute sets out the exclusive exceptions to the requirement that "each agency . . . shall make [requested] records promptly available," 5 U.S.C. § 552(a)(3)(A), none of which is that another agency has produced copies of the same documents: An agency need not produce certain classes of documents that the agency itself has already published in the Federal Register, *see* 5 U.S.C. § 552(a)(1), (3)(A); *Tax Analysts*, 492 U.S. at 152; that the agency itself has made generally available to the public in electronic format, *see* 5 U.S.C. § 552(a)(2), (3)(A); *Tax Analysts*, 492 U.S. at 152; or—if "the agency reasonably foresees that disclosure would harm an interest protected by an [enumerated statutory] exemption" or such disclosure is prohibited by law—that fall within an exemption, *see* 5 U.S.C. § 552(a)(8)(A), (b). There is no statutory exemption for material disclosed to the requester by another agency. *See* 5 U.S.C. § 552(b); *see also Tax Analysts*, 492 U.S. at 151 ("the exemptions are explicitly exclusive" (internal quotation marks omitted)); *Sikes v. U.S. Dep't of Navy*, 896 F.3d 1227, 1234 (11th Cir. 2018) ("as the [agency] must concede, none of the enumerated exemptions has anything to do with the situation where a person makes a second request for materials he has already received"). Nor, moreover, may courts scrutinize the requester's motivation for pursuing records in assessing their jurisdiction. *See* 5 U.S.C. § 552(a)(3)(A) (agency must make records available to "any person" upon "any request"); *EPA v. Mink*, 410 U.S. 73, 86 (1973) ("the Act, by its terms, [does not] permit inquiry into particularized needs of the individual seeking the information"), *superseded on other grounds*

by statute, Pub. L. No. 93-502, 88 Stat. 1561 (1974), *as recognized in CIA v. Sims*, 471 U.S. 159, 188-89 & n.5 (1985); *Nat'l Archives & Recs. Admin. v. Favish*, 541 U.S. 157, 172 (2004) ("as a general rule, when documents are within FOIA's disclosure provisions, [requesters] should not be required to explain why they seek the information").

USCIS's suggestion that this case is moot cannot be reconciled with the statutory text or controlling precedent. As the Supreme Court observed in *Tax Analysts*, "Congress undoubtedly was aware of the redundancies that might exist when requested materials have been previously made available. It chose to deal with that problem by crafting only narrow categories of materials which need not be, in effect, disclosed twice *by the agency*." 492 U.S. at 152. The vast majority of the cases USCIS cites for the proposition that the production of records moots a FOIA suit involved a production by the agency itself—that is, cases in which the agency was no longer withholding any records in response to a particular request.[3] They are inapposite. The only two cases that deal with another agency's production—*Crooker v. U.S. State Department*, 628 F.2d 9 (D.C. Cir. 1980), which preceded *Tax Analysts*, and *Williams & Connolly v. SEC*, 662 F.3d 1240

[3] *See Harvey v. Lynch*, 123 F. Supp. 3d 3, 5 (D.D.C. 2015) (case moot because "Defendants processed the request and produced responsive records"); *Perry v. Block*, 684 F.2d 121, 125, 129 (D.C. Cir. 1982) (summary judgment for defendants appropriate because they "had at long last surrendered all of the requested documents"); *Offor v. U.S. Equal Emp. Opportunity Comm'n*, 687 F. App'x 13, 14 (2d Cir. 2017) (summary order) (EEOC's production mooted suit for EEOC records); *Muset v. Ishimaru*, 783 F. Supp. 2d 360, 372 (E.D.N.Y. 2011) (claim against the IRS moot after "the documents that were the subject of the FOIA request were produced by the IRS"); *see also Jett v. Fed. Bureau of Investigation*, 139 F. Supp. 3d 352, 358, 364-65 (D.D.C. 2015) (ruling on the merits that FBI was not required to produce records that were exact duplicates of records it had already produced in response to the request). *Haji v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, No. 03 Civ. 8479 (DC), 2004 WL 1783625 (S.D.N.Y. Aug. 10, 2004), *Mitchell v. Kemp*, No. 91 Civ. 2983 (RWS), 1992 WL 188355 (S.D.N.Y. July 27, 1992), and *Triestman v. U.S. Department of Justice, Drug Enforcement Administration*, 878 F. Supp. 667 (S.D.N.Y. 1995), were all cases in which the requested records never or no longer existed, and thus were not being withheld. *See Haji*, 2004 WL 1783625, at *3; *Mitchell*, 1992 WL 188355, at *4; *Triestman*, 878 F. Supp. at 672-73.

(D.C. Cir. 2011), which relies on *Crooker*—should not be followed: they are non-binding and in conflict with the statute and Supreme Court and other authority. *See supra*; *see also Sikes*, 896 F.3d at 1236 & n.6 ("claim is not moot simply because the [agency] satisfied" a previous request for the "same materials" because the new request "is an independent request").

USCIS also ignores the practical realities of the FOIA. The statute entitles the requester to a specific procedure—including a reasonable search by the agency, a determination whether to withhold any responsive records in the agency's discretion, and production of responsive documents—at a particular time. *See Grand Cent. P'ship*, 166 F.3d at 489 (requirement is a "reasonable" search, not a "perfect" search); 5 U.S.C. § 552(a)(8)(A) (governing discretionary withholding decisions); 6 C.F.R. § 5.4(a) (default cut-off date for USCIS is date of search). What, if anything, an agency decides to withhold in its discretion at a particular time may very well diverge from the decision of another agency (or even the same agency) at a different time. And particularly when, as here, the records requested are not fixed but rather continue to be generated, the set of responsive records will likely be different depending on when the agency conducts its reasonable search. *See, e.g.*, Declaration of Eric F. Stein ¶ 11, ECF No. 37 (explaining that the State Department's January production contained "additional files added to [the pending refugee] case since the time the Department conducted the original search").

In sum, the actions of a different agency in response to a different request are not relevant to whether a controversy remains between IRAP and USCIS.

B. IRAP Has Not Received Everything It Requested

Second, even if the State Department's production were relevant, IRAP has not received everything it requested, as even USCIS concedes. *See* Def.'s Br. at 9 & n.3 (acknowledging withholdings on claims of exemptions even as it erroneously asserts that "[t]here is no genuine dispute that IRAP has now received the records it seeks"); SUF ¶¶ 96-97 (majority of records the

State Department produced were redacted either partially or completely). This is yet another reason this case cannot be moot. *See Crooker*, 628 F.2d at 11 ("Here, the request was fully satisfied."); *Williams & Connolly*, 662 F.3d at 1243 (request moot only with respect to "the eleven sets of notes previously released").

A requester challenging an agency's action under the FOIA in federal court has a right to the court's *de novo* review (which can include *in camera* inspection of the requested records) to determine the applicability of any exemptions invoked by the agency to justify redacting information or withholding documents in their entireties. *See* 5 U.S.C. § 552(a)(4)(B); *Bloomberg, L.P. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 601 F.3d 143, 147 (2d Cir. 2010) ("The agency's decision that the information is exempt from disclosure receives no deference."). Since information subject to the FOIA has been withheld from IRAP by both USCIS and the State Department, this case cannot be moot even on Defendant's own (erroneous) theory of the case. *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)); *Wright v. Giuliani*, 230 F.3d 543, 547 (2d Cir. 2000) (in non-FOIA context, holding that because order in separate case "does not purport to grant the precise relief sought," appeal is not moot); *Furrow v. Fed. Bureau of Prisons*, 420 F. App'x 607, 610 (7th Cir. 2011) (nonprecedential disposition) ("an action [under the FOIA] is not moot simply because an agency has decided that its partial disclosures are enough"). Indeed, USCIS's misplaced and misguided direction that IRAP file a new suit against the State Department to obtain records withheld, *see* Def.'s Br. at 9 n.3, only illustrates the existence of a live controversy between IRAP and USCIS.

C. USCIS's Practice of Refusing to Search WRAPS Will Continue to Harm IRAP

Third, even if the State Department's production were relevant and IRAP had received all records free of any withholdings, this case would still not be moot because USCIS's practice of

refusing to search WRAPS will continue to harm IRAP in the future. *See Newport Aeronautical Sales v. Dep't of Air Force*, 684 F.3d 160, 164 (D.C. Cir. 2012) ("even though a party may have obtained relief as to a *specific request* under the FOIA, this will not moot a claim that an agency *policy or practice* will impair the party's lawful access to information in the future" (internal quotation marks omitted)); *Tax Analysts*, 492 U.S. at 151 n.12 ("even 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"); *Whitaker v. Dep't of Com.*, 970 F.3d 200, 209 (2d Cir. 2020) (affirming judgment on merits of policy or practice claim); *Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 647 (2d Cir. 1998) ("A case becomes moot when interim relief or events have eradicated the effects of the defendant's act or omission, and there is no reasonable expectation that the alleged violation will recur."). *Contra* Def.'s Br. at 7 n.2 (suggesting that policy or practice claims are not viable in the Second Circuit).

As IRAP alleged in its complaint, it routinely files FOIA requests in connection with its direct advocacy for people seeking refugee resettlement. *See* Compl. ¶¶ 2, 4, 10, 37, 42, ECF No. 1. In response, USCIS produces no records and refuses to search WRAPS. *See id.* ¶¶ 1-2, 5, 40, 45, 52-53, 61-62. This practice of USCIS, which USCIS refuses to change (or, thus far, to defend on the merits), taxes IRAP's resources and blocks a key pathway for obtaining, and thus addressing the contents of, USCIS's records. *See id.* ¶¶ 1-5, 30-31, 37-53, 61-62. *See generally Newport Aeronautical*, 684 F.3d at 164 (explaining that a case was not moot because the requester alleged that the defendant agency "was following an impermissible practice in evaluating FOIA requests, and that [the requester] w[ould] suffer continuing injury due to this practice" (internal quotation

marks omitted)). Even alone, these allegations prevent this case from being moot.[4]

* * *

In all of these ways, "the issues presented [remain] 'live' [and] the parties [maintain] a legally cognizable interest in the outcome." *Chafin*, 568 U.S. at 172 (other internal quotation marks omitted). The Court should deny USCIS's motion to dismiss.

II. THE COURT SHOULD GRANT IRAP PARTIAL SUMMARY JUDGMENT

In a suit for agency records under the FOIA, "the defending agency has the burden of showing that its search was adequate," *Carney v. U.S. Dep't of Just.*, 19 F.3d 807, 812 (2d Cir. 1994), which requires proving that the search was "reasonably calculated to discover the requested documents," *Grand Cent. P'ship*, 166 F.3d at 489 (internal quotation marks omitted). If an agency contends that it was not required to search a particular location because the records there are supposedly not "agency records" covered by the FOIA, "[t]he burden is on the agency to demonstrate, not the requester to disprove, that the materials sought are not 'agency records.'" *Tax Analysts*, 492 U.S. at 142 n.3; *see, e.g.*, *Fox News Network, LLC v. Bd. of Governors of the Fed. Rsrv. Sys.*, 601 F.3d 158, 160-62 (2d Cir. 2010).

[4] To the extent USCIS relies on a supposed deficiency in IRAP's pleading to argue that the Court should dismiss this case, USCIS ignores most of IRAP's allegations and cites no law. *See* Def.'s Br. at 7 & n.2. Moreover, USCIS violates Part III.C. of the Court's Individual Practices, which requires a party contemplating a motion under Rule 12(b) to notify the plaintiff so that the parties may "consider in good faith a stipulation permitting . . . amendment" of the "subject pleading before motion practice" and ultimately to provide a statement in the notice of motion absent a resolution. *See* Order dated Dec. 8, 2020, ECF No. 27, at 4 (ordering summary judgment briefing); Def.'s Letter dated Jan. 8, 2021, ECF No. 28, at 1-2 (no mention of motion to dismiss); Notice of Mot., ECF No. 29, at 1 (no such statement). USCIS was on actual notice that IRAP intended to argue that USCIS has a policy or practice (or "pattern or practice") of violating the FOIA. *See* Pl.'s Letter dated Dec. 8, 2020, ECF No. 26, at 1 n.1 (citing *Newport Aeronautical*); Joint Letter dated Aug. 24, 2020, ECF No. 18, at 2 (arguing that the case is not moot because it involves a recurring issue). Should the Court conclude that IRAP has not adequately pleaded such a claim, IRAP intends to seek leave to amend.

For requested materials to be "agency records," (1) the agency "must either create or obtain [them]" and (2) the agency "must be in control of [them] at the time the FOIA request is made," "mean[ing] that the materials [must] have come into the agency's possession in the legitimate conduct of its official duties." *Tax Analysts*, 492 U.S. at 144-45 (internal quotation marks omitted); *see also Doyle v. U.S. Dep't of Homeland Sec.*, 959 F.3d 72, 76 (2d Cir. 2020) (summarizing the *Tax Analysts* standard). Congress has made clear that agency records include any information "maintained by an agency in any format, including an electronic format," as well as information "maintained for an agency by an entity under Government contract, for the purposes of records management." 5 U.S.C. § 552(f)(2).

Rule 56 of the Federal Rules of Civil Procedure "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The moving party may establish its entitlement to summary judgment either "by demonstrating that the non-moving party's evidence is insufficient to establish an essential element of the non-moving party's [case]" or "by submitting evidence that negates an essential element of the non-moving party's [case]." *Nick's Garage, Inc. v. Progressive Cas. Ins. Co.*, 875 F.3d 107, 114 (2d Cir. 2017) (internal quotation marks omitted); *see also* Fed. R. Civ. P. 56(c). Either way, the moving party establishes that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *See* Fed. R. Civ. P. 56(a); *Celotex*, 477 U.S. at 323 ("a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial").

Here, USCIS has failed to carry its burden to establish that refugee case files are not USCIS

records—an essential element of USCIS's defense. In fact, undisputed facts preclude such a conclusion. Whether based on USCIS's failure of proof, IRAP's affirmative showing, or both, the Court should grant IRAP partial summary judgment and enter the proposed order.

A. USCIS Has Failed to Establish That Refugee Case Files Are Not USCIS Records

The Court should grant partial summary judgment in IRAP's favor because the evidence cited by USCIS is insufficient to satisfy USCIS's burden of proof on the merits. Notwithstanding this burden and the Court's order, USCIS has declined to move for summary judgment, resting instead on the limited evidence it submitted with its motion to dismiss. USCIS purports to justify its action with a declaration by its FOIA Officer stating that "WRAPS is a system maintained and owned by the DOS." White Decl. ¶ 9, ECF No. 38; *see also* Def.'s Br. at 5, 11 n.4. Yet even if this assertion were uncontested—and it is not since WRAPS is maintained by Devis, a private contractor, *see* SUF ¶¶ 23-24—facts about the State Department's relationship to a document management system fall well short of demonstrating that records within that system are not USCIS records. USCIS's assertion says nothing about USCIS's relationship to the system or, critically, to the documents themselves, to which USCIS does not dispute it has access. *See Grand Cent. P'ship*, 166 F.3d at 481 (improper for court to conclude that notes were not "agency records" "without more information as to how the notes at issue (or similar notes in the past) were actually used or intended to be used"); *Eberg v. U.S. Dep't of Def.*, 193 F. Supp. 3d 95, 110 (D. Conn. 2016) (agency declaration "must give detailed justifications for not searching . . . any . . . databases it may own *or have access to*" (internal quotation marks omitted) (emphasis added)). *Cf. Whitaker*, 970 F.3d at 208 (two agencies sufficiently explained their failure to search an online portal built by an independent entity through affidavits asserting that one "[agency's] personnel did not have regular access" to the portal and that "[the other agency] does not have access" to the portal). This

deficiency alone warrants partial summary judgment for IRAP. *See Nick's Garage*, 875 F.3d at 114.

B. The Undisputed Facts Preclude a Conclusion That Refugee Case Files Are Not USCIS Records

In fact, the undisputed facts preclude a conclusion that refugee case files are not USCIS records. As to the first prong of the *Tax Analysts* standard, refugee case files are made up of documents that have been either "create[ed] or obtain[ed]" by USCIS. 492 U.S. at 144. They consist of two types of materials: records that USCIS requires to reach decisions on refugee cases—such as applications and supporting documents submitted according to USCIS procedures on USCIS forms, biometric information and security check results, and any correspondence pertaining to the applicant—and materials generated by USCIS officers in the course of reaching decisions. *See* SUF ¶¶ 4-9, 36-41. USCIS's connection to these refugee case files is far from a mere unexercised right of access: USCIS relies on these files to decide refugee applications (as well as applications for other types of immigration benefits), which is why they exist in the first place. *Compare Tax Analysts*, 492 U.S. at 144 (raw data for federally funded private medical study that "never passed into the hands of the agencies" were not agency records), *with* SUF ¶¶ 25-29, 42-53. There can be no genuine dispute that the refugee case file records that IRAP has requested—which pertain to USCIS's pending adjudication, including its initial denial, of IRAP's client's refugee application, *see* SUF ¶¶ 72-74, 81—were obtained or created by USCIS.

As to the second prong of the *Tax Analysts* standard, USCIS likewise "control[s]" refugee case files: they "have come into [USCIS's] possession in the legitimate conduct of its official duties" overseeing refugee adjudications. 492 U.S. at 145. Applying this standard, the Second Circuit has considered such factors as "the purpose for which the documents were created, the actual use to which they were put or were intended to be put, the extent to which the author and

other agency employees relied on the documents, [and] the circumstances surrounding the maintenance of the documents." *Grand Cent. P'ship*, 166 F.3d at 480; *see also Fox News Network*, 601 F.3d at 161-62 (relying on agency regulations to conclude that agency records include records "maintained for administrative reasons, in the regular course of business" by another entity). Here, there can be no genuine dispute that the documents that comprise refugee case files are created to enable USCIS, exercising its exclusive statutory authority, to decide refugee applications, *see* SUF ¶¶ 1-3, 25-29; are actually used in USCIS decisionmaking as intended, *see id.* ¶¶ 42-54; are relied on by the agency to make weighty decisions about issues such as a person's eligibility for refugee resettlement and whether to approve an application as a matter of discretion, *see id.* ¶ 48; and are compiled and stored under USCIS's statutory authority for the benefit of USCIS, *see id.* ¶¶ 25-29.

Other incontestable facts corroborate USCIS's control: USCIS itself, through its Privacy Act system of records notice, characterizes records located in WRAPS as part of its "system of records" and thus under its "control." *See id.* ¶¶ 34-35; *see also* 5 U.S.C. § 552a(a)(5) (defining a "system of records" as a group of records "under the control" of an agency). USCIS is directly accountable to refugee applicants for the confidentiality of the information it solicits for their case files. *See* SUF ¶ 10. And USCIS does search for and produce refugee case file documents from WRAPS—just not for the benefit of refugee applicants: under agreements with certain foreign governments, USCIS produces documents from WRAPS to those governments on request. *See id.* ¶ 57.

That USCIS possesses and uses WRAPS records through a secure internet link and not a physical filing cabinet is of no moment. Over the years since *Tax Analysts* was decided, Congress has amended the FOIA to underscore its broad scope and prevent its mandates from being eroded in the face of new technological realities. In 1996, Congress made clear that agency records

include information "maintained by an agency in *any format*, including an electronic format." Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, § 3, 110 Stat. 3048, 3049 (emphasis added). This provision served to "restrain agencies from evading the clear intent of the FOIA by deeming some forms of data as not being agency records subject to the law," and to ensure that "[w]hen other, yet-to-be invented technologies [we]re developed to store, maintain, produce, or otherwise record information, these w[ould] be records as well." H.R. Rep. No. 104-795, at 19-20 (1996) ("The language of the section should leave no doubt about the breadth of the policy."). Congress and courts have also specifically resisted the notion that the physical location of data should determine whether an electronic record used by agency employees is an agency record. *See* § 9, 121 Stat. at 2528-29 (clarifying that "agency records" includes information "that is maintained for an agency by an entity under Government contract, for the purposes of records management"); *see also Competitive Enter. Inst. v. Off. of Sci. & Tech. Pol'y*, 827 F.3d 145, 146-150 (D.C. Cir. 2016) (work-related communications by an agency employee maintained in a private email account on a private server are agency records); *Brennan Ctr. for Just. v. U.S. Dep't of Just.*, 377 F. Supp. 3d 428, 435-36 (S.D.N.Y. 2019) (same).

When it comes to refugee adjudications, WRAPS is USCIS's workspace, its means of communication, and the place it safeguards the records it has solicited and created to fulfill its exclusive statutory responsibility. In light of the undisputed facts, USCIS cannot establish that refugee case files with WRAPS are not USCIS records.

* * *

Because USCIS has not satisfied and cannot satisfy its burden to show that refugee case files are not USCIS records, the Court should grant IRAP partial summary judgment and enter the proposed order.

CONCLUSION

For the foregoing reasons, the Court should deny USCIS's motion to dismiss and grant IRAP's motion for partial summary judgment.

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