

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

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PUBLIC CITIZEN, INC.,)	
	Plaintiff,)	Civil Action No. 19-915 (CJN)
)	
v.)	
)	
UNITED STATES DEPARTMENT OF)	
HOUSING AND URBAN DEVELOPMENT,)	
	Defendant.)	
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PLAINTIFF’S MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, Plaintiff Public Citizen, Inc. hereby moves for partial summary judgment in this Freedom of Information Act case against Defendant U.S. Department of Housing and Urban Development, on the ground that there is no genuine issue of disputed material fact and that Plaintiff is entitled to judgment as a matter of law as to Defendant’s practice of redacting and withholding portions of responsive records as “non responsive.”

In support of this motion, Plaintiff submits the accompanying Memorandum in Support of Plaintiff’s Motion for Partial Summary Judgment; Plaintiff’s Statement of Undisputed Material Facts; Declaration of Adam R. Pulver and accompanying exhibits; and a proposed order.

Dated: August 7, 2019

Respectfully submitted,

/s/ Adam R. Pulver
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	Plaintiff,)	Civil Action No. 19-915 (CJN)
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**MEMORANDUM IN SUPPORT OF PLAINTIFF’S MOTION FOR PARTIAL
SUMMARY JUDGMENT**

Plaintiff Public Citizen filed this lawsuit under the Freedom of Information Act (FOIA) seeking the production of records responsive to a FOIA request submitted to Defendant United States Department of Housing and Urban Development (HUD) in December 2018. After Public Citizen filed the lawsuit, HUD produced some responsive documents. HUD redacted, however, nearly *forty percent* of the responsive records with the notation “Non Responsive Record,” blacking out individual words, phrases, sentences, and paragraphs. Because HUD’s practice of designating portions of responsive records as individual records is unlawful under FOIA, as confirmed by D.C. Circuit precedent, the Court should grant partial summary judgment to Plaintiff, declare that HUD’s redactions of “non responsive” text contained within responsive records is unlawful, and order HUD to remove the improper redactions and cease making redactions on this basis. Resolving this discrete issue now will further judicial efficiency, conserve agency resources, and speed the slow pace of disclosure in response to Public Citizen’s FOIA request.

BACKGROUND

On December 19, 2018, Plaintiff submitted a FOIA request to HUD seeking three categories of records related to the eligibility of participants in the Deferred Action for Childhood

Arrivals (DACA) program for Federal Housing Administration loans from seven HUD offices. Ex. 1.¹ The request specified that it sought “all nonexempt portions of the records,” and that HUD should not redact “portions of any record as ‘non-responsive,’ ‘out of scope,’ or the like.” *Id.* at 1. Public Citizen also sought a public-interest fee waiver. *Id.* HUD denied the fee waiver but gave no substantive response to the request for records. On April 1, 2019, Public Citizen filed this action. ECF 1.

Although no production schedule is in effect in this case, HUD began to disclose responsive records after Public Citizen filed suit. On June 4, 2019, HUD produced 90 pages, with some redactions marked as FOIA exemptions 5 and 6. Ex. 2. On July 2, 2019, HUD produced an additional 398 pages in response to the request. This time, it redacted portions of 90 pages with a notation “Non Responsive Record.” Ex. 4.² HUD made the “Non Responsive Record” redactions to parts of responsive emails or attachments to emails that contained material responsive to Plaintiff’s request. *Id.* Those redactions fall into four categories:

- (1) Individual lines and paragraphs in portions of five individual emails (JUL02-08 through JUL02-16; JUL02-265; JUL02-384 through 385; JUL02-387 through 391; and JUL02-393 through 398);
- (2) Partial content of individual slides within a single PowerPoint presentation, including parts of sentences and individual bullet points (JUL02-21 through 30);

¹ All Exhibits are attached to the concurrently filed Declaration of Adam R. Pulver.

² Plaintiff’s Exhibit 4 consists of all of the redacted pages in the July 2, 2019, production, as well as pages in that production that provide context to those redactions. All references to JUL02-### are to documents within Exhibit 4. Some of the redactions appear to be duplicates. The redactions on pages JUL02-309 through 315 appear to be the same as those on JUL02-8 through 17; the redactions on page JUL02-319 through 328 appear to be the same as those on JUL02-21 through 30; the redaction on JUL02-333 appears to be the same as that on JUL02-265; and the redactions on JUL02-337 through 341 appear to be the same as those on JUL02-269 through 273. Although Plaintiff maintains the redactions are inappropriate in both places they appear, for simplicity, it only cites to each redaction the first place it appears in the production.

- (3) Portions of minutes and agendas from two meetings of the “Escalation Review Committee” (JUL02-256 through 260; JUL02-261 through 264; JUL02-269 through 273; JUL02-277 through 281; and JUL02-286 through 290); and
- (4) Portions of minutes from two “HUD/Lender Round Table Discussions” (JUL02-350 through 354 and JUL02-355 through 359).

Plaintiff’s counsel raised objections to these redactions with Defendant’s counsel, who responded that the words, sentences, and paragraphs redacted from the responsive records are separate “records.” *See* ECF 13 at ¶ 17 (Joint Status Report).

On August 7, 2019, HUD produced an additional 552 pages. *See* Ex. 6. This time, HUD redacted portions of 321 pages with either the words “Non Responsive Record” or “Withheld pursuant to exemption Non Responsive Record of the Freedom of Information Act.” *See* Ex. 6; Pulver Decl. ¶ 7. HUD’s “Non Responsive Record” redactions in the August 7, 2019, production follow the same pattern as those in the July 2, 2019, production, including redactions of portions of emails with undisputedly responsive information, and of portions of attachments with undisputedly responsive information. Pulver Decl. ¶ 7.³

On July 18, 2019, HUD indicated that it had an additional 1,800 pages of “hard copy” documents to process, as well as an unknown number of “hard copy” documents from an additional custodian. ECF 13 at ¶ 7. It also had not begun to review 6,000 “e-discovery” files. *Id.* at ¶ 8. HUD has only committed to completing its review and processing of these remaining documents at a rate of 500 pages or files per month—excluding federal holidays, staff vacations, or government shutdown days. *Id.* at ¶ 6. At that rate, HUD will not complete production until December 2020, at the earliest. If HUD continues its unlawful practice of redacting individual words, sentences,

³ Since discussion of the individual redactions in the August 7, 2019, production and their inconsistency with Circuit precedent would be redundant, Plaintiff discusses redactions in the July 2, 2019, production as exemplars.

and paragraphs as “non-responsive records” throughout that time, HUD will then need to re-process a large number of documents.

LEGAL STANDARD

Summary judgment is appropriate when “there is no dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). In deciding a motion for summary judgment, the Court draws all reasonable inferences in the non-movant’s favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). “FOIA cases are typically resolved on motions for summary judgment.” *Elec. Privacy Info. Ctr. v. Customs & Border Prot.*, 160 F. Supp. 3d 354, 357 (D.D.C. 2016).

Review of an agency’s withholding under FOIA is governed by the principles that the statute’s “exemptions ‘are explicitly made exclusive’ and ‘must be narrowly construed.’” *Elec. Privacy Info. Ctr. v. U.S. Dep’t of Homeland Sec.*, 777 F.3d 518, 522 (D.C. Cir. 2015) (quoting *Milner v. Dep’t of Navy*, 572 U.S. 562, 565 (2011)). “The burden is on the agency to justify withholding the requested documents, and the FOIA directs district courts to determine *de novo* whether non-disclosure was permissible.” *EPIC v. DHS*, 777 F.3d at 522.

ARGUMENT

In *American Immigration Lawyers Association v. Executive Office for Immigration Review (AILA)*, 830 F.3d 667 (D.C. Cir. 2016), the D.C. Circuit addressed the question: “if the government identifies a record as responsive to a FOIA request, can the government nonetheless redact particular information within the responsive record on the basis that the information is non-responsive?” 830 F.3d at 677. The court answered that FOIA provides “no authority ... for the government to do so.” *Id.*

[N]othing in the statute suggests that the agency may parse a responsive record to redact specific information within it even if none of the statutory exemptions

shields that information from disclosure. To the contrary, in expressly allowing for—and only for—“deletion of the portions” of a responsive record “which are exempt,” 5 U.S.C. § 552(b), the statute reinforces the absence of any authority to delete portions of a responsive record which are *not* exempt.

Id. at 677–78. In short, “if a record contains information responsive to a FOIA request, the government must disclose *the entire record.*” *Institute for Policy Studies v. U.S. Central Intelligence Agency*, Civ. No. 06-960, 2019 WL 3459073, at *1 (D.D.C. July 31, 2019) (emphasis added) (citing *AILA*, 830 F.3d at 676–79).

The court acknowledged that FOIA does not define what constitutes a “record” and that there is a “range of possible ways in which an agency might conceive of a ‘record.’” *Id.* at 678. It nonetheless made clear that, “once an agency itself identifies a particular document or collection of material—such as a chain of emails—as a responsive ‘record,’ the only information the agency may redact from that record is that falling within one of the statutory exemptions.” *Id.* at 678–79. And the court noted that it is “difficult to believe that any reasonable understanding of a “record” would permit withholding an individual sentence within a paragraph within an email on the ground that the sentence alone could be conceived of as a distinct, non-responsive ‘record.’” 830 F.3d at 679. *AILA* thus imposes a “minimum hurdle” barring agencies from “withhold[ing] single sentences, or even paragraphs, as non-responsive from within the results of its search.” *Shapiro v. CIA*, 247 F. Supp. 3d 53, 75 (D.D.C. 2017).

Here, HUD has done just that, withholding individual words, sentences, and paragraphs of responsive e-mails, PowerPoint presentations, Word documents, and PDF files on the theory that particular words, sentences, and paragraphs within those documents are distinct “Non Responsive Records.” Applying *AILA*, however, courts in this district have regularly rejected redactions similar to, and even less thinly sliced than, those made by HUD here. In *Institute for Policy Studies*, for example, the court rejected redactions where, like here, the agency “dice[d]” responsive records

“into discrete paragraphs and sentences in a way that disregards their original form and function.” 2019 WL 3459073, at *2; *see also Cable News Network, Inc. v. FBI*, 298 F. Supp. 3d 124, 130 (D.D.C. 2018) (ordering agency to produce non-exempt information contained in responsive email, even though that information was not relevant to plaintiff’s request). With respect to emails and attachments in particular, courts have held that “ordinary practice leaves very little wiggle room in generally requiring an email with attachments to be kept together as a single record.” *Judge Rotenberg Educ. Ctr., Inc. v. FDA*, 376 F. Supp. 3d 47, 62 (D.D.C. 2019). Thus, “‘attachments should reasonably be considered part and parcel of the email by which they were sent’ when the email ‘make[s] explicit reference to, or include[s] discussion of, the missing attachments.’” *Id.* at 61 (quoting *Coffey v. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1, 8 (D.D.C. 2017)); *see New Orleans Workers’ Ctr. for Racial Justice v. U.S. Immigration & Customs Enforcement*, 373 F. Supp. 3d 15, 44 (D.D.C. 2019) (holding that an email and its attachments constitute a single record); *Am. Oversight v. GSA*, 311 F. Supp. 3d 327, 340 (D.D.C. 2018) (ordering production of attachments to responsive emails); *see also Am. Oversight v. HHS*, 380 F. Supp. 3d 45, 51 (D.D.C. 2019) (rejecting agency redactions and noting “it is commonly understood that an email chain operates as a single record”); *Parker v. United States Dep’t of Justice, Office of Prof’l Responsibility*, 278 F. Supp. 3d 446, 451–52 (D.D.C. 2017) (finding letter and its attachment were single “record”).

HUD’s production here runs counter to the holdings of all these cases. The redactions at issue are all either within individual responsive emails or attachments to those emails, and most are within attachments that are independently responsive. *See* Ex. 4. Indeed, if the redactions were not parts of responsive records, they would not appear in the production, as pursuant to FOIA an agency produces its responsive records, not the plethora of non-responsive records in its

possession. The text redacted by HUD here thus appears in the production only because the text is in fact part of a responsive record.

For example, HUD produced a June 28, 2018, PowerPoint presentation because that presentation is responsive to Public Citizen's FOIA request. Yet HUD redacted as "Non Responsive Record" portions of a single bullet point on a single slide within that presentation—a bullet point that references FHA's position on the eligibility of DACA recipients for loans. *See* Ex. 4 (JUL02-24). Likewise, HUD produced minutes from the June 27, 2018, "HUD/Lender Round Table Discussion" but redacted the document almost entirely with the notation "Non Responsive Record," although those minutes discuss the eligibility of DACA recipients for FHA loans. *See id.* (JUL02-356). Once HUD determined that the PowerPoint presentation and the minutes were responsive to the FOIA request, though, it was obligated to produce the records in their entirety, subject only to FOIA's nine exemptions. *See, e.g., Pub. Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 869 (D.C. Cir. 2010) ("FOIA allows agencies to withhold only those documents that fall under one of nine specific exemptions.").

Importantly, HUD's redaction practices are inconsistent, raising the concern that its practice is intended to hide non-exempt material that it prefers to keep from public view. There were no redactions of parts of emails or attachments in HUD's June production. And no rationally consistent policy for defining records would explain how a single PowerPoint slide contained multiple "Non Responsive Records" that could appropriately be redacted while, for example, the dozens of items in the lengthy "HUD Daily Briefings" that had no relation to Plaintiff's FOIA Request were not redacted. *See* Ex. 5. As Chief Judge Howell recently noted, in determining "where one record ends and another begins," "courts must be careful to ensure that the term 'agency records' not be manipulated to avoid the basic structure of the FOIA." *Judge Rotenberg*

Educ. Ctr., 376 F. Supp. 3d at 60 (quoting *Consumer Fed'n of Am. v. U.S. Dep't of Agric.*, 455 F.3d 283, 287 (D.C. Cir. 2006) (cleaned up)). HUD's inconsistent practices suggest it is adjusting its definition of "record" as it goes along to circumvent FOIA's requirement that all non-exempt information be disclosed—"precisely the sort of manipulation that undermines the purpose of FOIA." *Judge Rotenberg Educ. Ctr.*, 376 F. Supp. 3d at 61.

In addition, the Department of Justice's FOIA guidance to agencies states that, "[g]enerally, agencies should not define records 'on less than a page-by-page basis.'" *Judge Rotenberg Educ. Ctr.*, 376 F. Supp. 3d at 60 (citing Dep't of Justice, OIP Guidance: Determining the Scope of a FOIA Request, FOIA Update, Vol. XVI, No. 3 (updated Aug. 13, 2014)); *see Institute for Policy Studies*, 2019 WL 3459073 at *1. HUD's line-by-line redactions of non-exempt text based on the notion that pieces of text constitute "non-responsive" records run counter to this policy.

Because there is no legal or factual support for the position that individual words, sentences, or paragraphs within individual emails or attachments constitute separate "records" under FOIA, HUD's redactions are unlawful. Because this practice has the potential to pervade HUD's entire production of this case, to slow processing, and later to require HUD to reprocess a large number of records, resolution of the issue is needed at this time.

CONCLUSION

For the above-stated reasons, the Court should grant Plaintiff's motion for partial summary judgment, declare that HUD's redactions of "non-responsive" text from responsive records is unlawful, and order HUD to remove the challenged redactions and cease making redactions on this basis in any future production.

Dated: August 7, 2019

Respectfully submitted,

/s/ Adam R. Pulver

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