UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN, INC., Plaintiff,	Civil Action No. 19-915 (CJN)
v.	
UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, Defendant.	

PLAINTIFF'S MEMORANDUM IN FURTHER SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

The parties' cross-motions for partial summary judgment address the redaction by defendant Department of Housing and Urban Development (HUD) of non-exempt text from documents that HUD has determined are responsive to plaintiff Public Citizen's Freedom of Information Act (FOIA) request. In *American Immigration Lawyers Ass'n v. Executive Office for Immigration Review* (*AILA*), 830 F.3d 667 (D.C. Cir. 2016), the D.C. Circuit confirmed what FOIA makes plain: Once a record is determined to contain material responsive to a FOIA request, the agency must produce the entire record, except for portions that fall within one of FOIA's statutory exemptions. HUD's position that individual words, lines, or paragraphs within responsive documents constitute independent "records" because they address different "topics" is wholly inconsistent with the D.C. Circuit's decision and is unlawful. Moreover, HUD's claim that this Court cannot order a "workable rule" for it to comply with lacks merit: this Court can, and should, order Defendant to cease redacting as "non-responsive" individual words, lines, and paragraphs within responsive documents.

ARGUMENT

HUD does not deny its practice of withholding individual pieces of responsive documents as "non-responsive." It argues, however, that Public Citizen cannot challenge this practice on its face, but rather must assert a specific challenge to each of the thousands of its withholdings, document by document, redaction by redaction. ECF 21-1 (Def.'s Mem.) at 3. This argument is unsupported by FOIA, *AILA*, and the many district court decisions to have considered the issue of agency "non-responsive" redactions. *See* ECF 14 (Pl.'s Mem.) at 4–6. Pursuant to FOIA and D.C. Circuit case law, the Court should order HUD to cease redacting as "non-responsive" individual words, lines, and paragraphs within individual documents and, as to documents already produced, to re-produce them without redactions of purportedly "non-responsive" text.

I. HUD's Definition of a "Record" is Unlawful.

In its motion for partial summary judgment as to HUD's redaction of non-exempt words, lines, and paragraphs within responsive documents on the theory that the discrete pieces of text are "non-responsive records," Public Citizen cited D.C. Circuit case law and several district court decisions that make clear that such redaction is unlawful under FOIA. *See* ECF 14 at 4–6 (citing *AILA* and seven district court opinions). As the D.C. Circuit stated,

> 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.

AILA, 830 F.3d at 678–79. And while noting that there is a "range of possible ways in which an agency might conceive of a 'record,'" *id.* at 678, the court stated that no "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,'" *id.* at 679. HUD's practice cannot be reconciled with the D.C. Circuit's holding in *AILA*.

Notably, HUD has not cited a single case from this or any other jurisdiction that supports its practice of treating individual words, sentences, and paragraphs within documents as discrete "records." Instead, HUD simply asserts that it "appropriate[ly] defined records based on topic." ECF 21-1 at 2. The process it describes for determining what constitutes an individual record, however, is untethered from the statute and case law. HUD staff apparently look at a document, and if pieces of text are non-responsive, deems those parts individual records and redacts them. ECF 21-3 at ¶¶ 5–10 (Jih Decl.).[1] That approach conflates responsiveness with the definition of a record. The "topics" covered by a document determine whether the document is responsive, but the topics do not define the boundaries of an individual "record." This is why in *AILA*, although the court noted that "it is not unusual for an email chain to traverse a variety of topics having no relationship to the subject of a FOIA request," it agreed that FOIA required the entirety of each responsive email, even text on a different "topic," to be produced. 830 F.3d at 678. *See also Cable News Network, Inc. v. FBI*, 298 F. Supp. 3d 124, 130 (D.D.C. 2018) (requiring disclosure of material in email despite agency's claim that the material was on a non-responsive "topic"). Defining a "record" as each piece of text that concerns a single topic is "precisely the sort of manipulation that undermines the purpose of FOIA." *Judge Rotenberg Educ. Ctr., Inc. v. FDA*, 376 F. Supp. 3d 47, 61 (D.D.C. 2019). "*AILA* set a minimum bar for what *cannot* be considered a discrete, non-responsive record: a single (or perhaps a few) sentences within an otherwise responsive paragraph." *Shapiro v. CIA*, 247 F. Supp. 3d 53, 74 (D.D.C. 2017) (citing 830 F.3d at 679). HUD's practice fails to meet this minimum bar.

[1] The majority of the declaration is dedicated to explaining why the agency has determined that information within individual emails, meeting minutes, and agendas, and a PowerPoint presentation is "non-responsive." *See* ECF 21-3 ¶¶ 11–30. This explanation is immaterial to the question of whether the redacted information constitutes a separate record.

HUD is correct that agencies have *some* leeway in determining what a record is, but it fails to offer a reasonable basis for its determination. Indeed, while HUD lists the consideration identified by the court in *Shapiro*, 274 F. Supp. 3d at 74, its practice fails to account for any of those considerations. For instance, the first consideration noted in *Shapiro*, "the requester's intent," *id.*, does not support HUD's practice, particularly here, where Public Citizen requested that HUD produce responsive records "*in their entirety* … without redacting portions of any records as 'non-responsive,' 'out of scope,' or the like." ECF 14-3 (Ex. 1) at 1 (emphasis in original). *Shapiro* also indicated that agencies should consider "maintaining the integrity of the released documents" as a factor in determining the scope of a record. 274 F. Supp. 3d at 74. HUD's carving up of a single PowerPoint page or email into Swiss cheese, however, does not do so. And HUD's practice of dividing individual emails, word documents, and PowerPoint slides into multiple records cannot reasonably be said to reflect "the agency's own knowledge regarding storage and maintenance of documents," *id.*, as those documents are stored and maintained as single units. Finally, HUD could not reasonably claim that its practice helps "maintain[] the public's trust in transparency." *Id.*

Of the numerous cases from this district cited in Public Citizen's opening memorandum, HUD attempts to distinguish only one, *Institute for Policy Studies v. CIA*, 388 F. Supp. 3d 51 (D.D.C. 2019). In that case, the court rejected the agency's argument that it could "dice" responsive documents "into discrete sentences and paragraphs in a way that disregards their original form and function." *Id.* at 54. HUD asserts that *Institute for Policy Studies* is distinguishable because, here, the agency did not "disregard" the "form and function." Def.'s Mem. at 3. HUD's conclusory statement is belied by review of the redacted pages. As Judge Lamberth explained in *Institute for Policy Studies*, the phrase "original form and function" refers to how a record is meant to be read: "Manuals need not be read cover-to-cover to be useful; a book author likely intends his audience

to encounter a few pages at a time. But a daily or weekly intelligence summary—itself just a few pages long—is an unlikely candidate for piecemeal consumption." 388 F. Supp. 3d at 54. Here, the documents' authors surely did not intend each word, sentence, or paragraph that HUD has treated as a separate record to be independently encountered by their audiences. For example, in its most recent production, HUD redacted a single sentence in an e-mail as follows:

Hot topics are likely to be [Non Responsive Record] and DACA.

Pulver Supp. Decl., Ex. 7 (SEP23-296). This redaction plainly does not respect the original form and function of the e-mail. Neither the word "DACA" nor the other half of the sentence was meant for "piecemeal consumption." Similarly, parts of bullet points within a single PowerPoint slide are not intended for piecemeal consumption. *See, e.g.*, ECF 14-6 (Ex. 4) at JUL02-24, JUL02-319.

HUD's reliance on guidance from the Department of Justice's Office of Information Policy (OIP) fares no better. To begin with, given that Congress has not delegated to OIP the authority to interpret FOIA, its interpretation of FOIA is not entitled to any deference. *See Am. Library Ass'n v. FCC*, 406 F.3d 689, 699 (D.C. Cir. 2005). In any event, HUD's practice is inconsistent with the guidance. The OIP guidance advises agencies that, "in the *AILA* case, the D.C. Circuit noted that it found 'it 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."'" OIP Guidance, Defining a "Record" Under the FOIA, https://www.justice.gov/oip/oip-guidance/defining_a_record_under_the_foia (quoting *AILA*, 830 F.3d at 679). Here, HUD has withheld not only numerous individual sentences, but phrases and words. Although the guidance suggests that a "paragraph within an email or document" could "*potentially* constitute a distinct record," it explains that would be so "*only if* the subject of the request is sufficiently specific to pertain only

to that paragraph *and* the subject of the paragraph is sufficiently distinct from the surrounding paragraphs to constitute a distinct record." *Id.* HUD's extensive redactions do not even arguably fit this description.

In short, "the government proposes carving pages into individual [words,] paragraphs and sentences. That contravenes not only the Justice Department's guidance, but *AILA* itself." *Inst. for Policy Studies*, 388 F. Supp. 3d at 53. While HUD avers that it should not have to produce an entire document simply because it contains some responsive material since it "would regularly result in federal agencies processing and producing superfluous, discrete packages of information that are wholly nonresponsive to a given FOIA request," ECF 21-3 at ¶ 8, that is not a policy choice HUD is free to make. *Cf. Inst. for Policy Studies*, 388 F. Supp. 3d at 54 (recognizing this concern but finding court is "bound by [FOIA's] text and *AILA*'s holding").

II. HUD's Cross-Motion Should Also Be Denied Because It Is Procedurally Improper.

Federal Rule of Civil Procedure 7(b) requires parties seeking relief to file a motion that "state[s] with particularity the grounds for seeking the order," as well as "the relief sought." HUD did not do so. Nowhere in either the cover document that it electronically filed as a "Cross-Motion" or its supporting memorandum did HUD specify what relief it seeks. *See* ECF 22, ECF 22-1. HUD also failed to submit a proposed order, in violation of Local Rule 7(c).

Accordingly, although Public Citizen is able to respond to the arguments made in HUD's memorandum, it is unable to address HUD's request, implicit in the cross-motion, for judgment on some issue or claim. Further confusing the point, HUD has argued that the issue on which Public Citizen seeks summary judgment should not be addressed at this time, but should be "analyzed in a document-specific manner" after the completion of production. ECF 22-1 at 5.

Given the extensions HUD was granted to respond to Plaintiff's eight-page motion filed nearly two months ago, as well as the experience of the United States Attorney's Office, HUD should not be given the opportunity to remedy these flaws and further delay resolution of this dispute. Rather, these procedural violations provide an independent basis for denying HUD's cross-motion. *See, e.g.*, *Benoit v. U.S. Dep't of Agric.*, 608 F.3d 17, 31 (D.C. Cir. 2010) (affirming denial of motion for failure to comply with Fed. R. Civ. P. 7(b)).

CONCLUSION

For the foregoing reasons, Plaintiff's motion for partial summary judgment should be granted, and Defendant's cross-motion for partial summary judgment should be denied. Defendant should be ordered to re-produce all documents produced thus far without redactions for responsiveness within individual documents, including emails, Word files, Adobe Acrobat files, and PowerPoint presentations, and to cease making such redactions in all future productions.

Dated: October 3, 2019

Respectfully submitted,

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