

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

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PETER M. SHANE,)
c/o Public Citizen Litigation Group)
1600 20th Street NW)
Washington, DC 20009,)
)
Plaintiff,)
)
v.	Case No. 1:20-cv-169)
)
U.S. DEPARTMENT OF HOMELAND)
SECURITY,)
2707 Martin Luther King Jr. Ave. SE))
Washington, DC 20528-0485,)
)
Defendant.)
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COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. Plaintiff Peter M. Shane brings this action to compel the U.S. Department of Homeland Security (DHS) to produce records under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. The records at issue concern the Secretary of Homeland Security’s designation of an order of succession for Acting Secretary.

JURISDICTION AND VENUE

2. This Court has jurisdiction under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331. Venue is proper under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

PARTIES

3. Plaintiff Peter M. Shane is a law professor at The Ohio State University Moritz College of Law. He is an internationally recognized scholar in administrative law with a specialty in separation of powers and has co-authored leading casebooks on each subject. Professor Shane submitted the FOIA request at issue in this case.

4. Defendant DHS is an agency of the United States. DHS has possession or control of records responsive to Professor Shane's FOIA request.

FACTS

5. On April 12, 2019, Professor Shane submitted to DHS a FOIA request seeking any orders or memoranda dated subsequent to December 9, 2016, by which any Secretary of Homeland Security has exercised his or her authority under 6 U.S.C. § 113(g)(2) to "designate such other officers of [DHS] in further order of succession to serve as Acting Secretary."

6. On April 17, 2019, DHS acknowledged Professor Shane's FOIA request and assigned it reference number 2019-HQFO-00617.

7. In his FOIA request, Professor Shane sought a full waiver of fees under 5 U.S.C. § 552(a)(4)(A)(iii).

8. In its April 17, 2019 acknowledgment letter, DHS stated that it would "conditionally grant" Professor Shane's fee-waiver request. DHS also stated that the final "fee waiver determination will be based upon a sampling of the responsive documents received from the various DHS program offices as a result of the searches conducted in response to [the] FOIA request." DHS further stated that, following review of this sampling of documents, if DHS determined that "disclosure of the information contained in those documents does not meet the factors permitting DHS to waive fees," DHS would "either deny [the] fee waiver request entirely, or will allow for a percentage reduction in the amount of the fees corresponding to the amount of relevant material found that meets the factors allowing for a fee waiver."

9. FOIA does not permit agencies to make *post hoc* fee-waiver determinations based on the content of the records ultimately released. Rather, FOIA's fee-waiver provision "requires an *ex ante* assessment of the potential public value of the information requested, with little or no

regard to whether any documents supplied prove to advance the public interest.” *Morley v. CIA*, 810 F.3d 841, 844 (D.C. Cir. 2016).

10. On July 16, 2019, DHS denied Professor Shane’s FOIA request. Specifically, DHS stated that it found two pages of responsive records but was withholding both pages in full under exemption 5, 5 U.S.C. § 552(b)(5).

11. In its July 16, 2019 denial letter, DHS also stated that it would not charge Professor Shane any fees for the processing of his FOIA request because the total cost was below \$25. DHS did not provide a “final determination” of Professor Shane’s fee-waiver request.

12. On July 17, 2019, Professor Shane submitted an administrative appeal challenging DHS’s denial of his FOIA request.

13. On September 25, 2019, DHS responded to Professor Shane’s administrative appeal by stating that it was remanding the request “to DHS for further explanation of their application of FOIA Exemption 5.” The agency official deciding the appeal explained that he had “reviewed both the withheld documents” and was “unable to determine whether DHS properly applied Exemption 5.” The agency official, therefore, remanded the request to DHS “with instructions for the agencies to provide [his] office an explanation as to the specific privileges applied.” Following receipt of the further explanation, the agency official stated he would provide Professor Shane “with an updated decision disposing of [his] entire appeal.” The agency official informed Professor Shane that he had asked DHS to provide a further explanation within 30 days.

14. On October 29, 2019, DHS provided a final response to Professor Shane’s administrative appeal. The agency official who issued the September 25, 2019 response explained that he had previously remanded the request to DHS for further explanation within 30 days. Because the agency official had received no response from DHS, he explained that “this letter

constitutes final agency action” and that Professor Shane could pursue this request further in federal district court. DHS further informed Professor Shane of the availability of dispute resolution services from the Office of Government Information Services (OGIS).

15. On October 30, 2019, Professor Shane submitted to OGIS via email a request for assistance in resolving DHS’s withholding of responsive records.

16. On November 27, 2019, OGIS responded by email that OGIS had “reached out to the DHS FOIA Public Liaison to inquire about the status of the remand of [Professor Shane’s] FOIA request,” but that “DHS stands by its initial determination that the requested information should be withheld under Exemption 5 because the information is covered by the deliberative process and attorney-client privileges.” OGIS reiterated that Professor Shane “may seek judicial review of this decision” under 5 U.S.C. §552(a)(4)(B) and offered no further assistance.

17. DHS has not produced any records in response to Professor Shane’s FOIA request.

**CLAIM FOR RELIEF
(Denial of FOIA request)**

18. Professor Shane has a statutory right under FOIA, 5 U.S.C. § 552(a)(3)(A), to the records he requested, and DHS has no legal basis for its failure to produce those records.

PRAYER FOR RELIEF

Professor Shane requests that this Court:

- A. Declare that DHS’s withholding in full of records responsive to Professor Shane’s FOIA request is unlawful;
- B. Order DHS to make the requested records available to Professor Shane at no cost and without delay;
- C. Award Professor Shane his costs and reasonable attorneys’ fees under 5 U.S.C. § 552(a)(4)(E); and

D. Grant all other appropriate relief.

Dated: January 22, 2020

Respectfully submitted,

/s/ Patrick D. Llewellyn

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