

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

CITIZENS FOR CONSTITUTIONAL
INTEGRITY,

Plaintiff,

v.

THE U.S. DEPARTMENT OF
COMMERCE, *et al.*,

Defendants.

Case No. 1:23-cv-1481-JMC

**PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

When Congress directed agencies to produce documents “promptly” in response to requests under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, it never imagined an agency would take two years to produce a single document designated by a statute. Congress required the Secretary of Commerce to send a report on “[t]he tabulation of total population by States as required for the apportionment of Representatives.” 13 U.S.C. § 141(b). The Secretary sent a report in April 2021 (the 2021 Report), and Citizens requested it under FOIA three weeks later.

After emailing, following up, and appealing, the U.S. Department of Commerce, the Census Bureau, and Secretary Gina Raimondo (collectively, Commerce) have still failed to produce the 2021 Report. Citizens had no alternative but to resort to this Court. “Congress viewed the federal courts as the necessary protectors of the public’s right to know.” *GTE Sylvania, Inc. v. Consumers Union of the U.S., Inc.*, 445 U.S. 375, 387 (1980). All FOIA deadlines have long passed, and Commerce is out of excuses. FOIA compels Commerce to produce the 2021 Report immediately.

LEGAL BACKGROUND

Congress assigned Commerce the responsibility for tabulating the actual enumeration of persons in the United States, for apportioning seats in the U.S. House of Representatives among the states, and for sending a report to the President. 13 U.S.C. § 141. FOIA gives citizens rights to reports like that.

I. Every ten years, Commerce apportions representative seats.

The Constitution directs the United States to apportion “Representatives . . . among the several States according to their respective numbers, counting the whole Pl.’s Mem. of P&A in Supp. of its Mot. for Summ. J.
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number of persons in each State.” U.S. Const. amend. XIV, sec. 2. It requires the Executive Branch to conduct an “actual Enumeration” every ten years in “such Manner as” Congress directs, as long as each state receives “at Least one Representative.” U.S. Const. art. 1, sec. 2.

When distributing 435 Representatives among fifty states, the shifting populations never divide evenly among 435 districts. *U.S. Dep’t of Commerce v. Montana*, 503 U.S. 442, 452 (1992) (“the fractional remainder problem”). Therefore, every apportionment method leaves states larger or smaller remainders of population without representatives. Depending on the method for handling remainders, some states win and some states lose. *See generally id.*

For about 150 years, Congress switched among various apportionment methods. *Id.* at 448-51. That ad hoc system broke down after the 1920 census, when Congress failed to apportion the seats based on those census results. *Id.* at 448. To make a self-executing process going forward, Congress now requires the Secretary to report to the President. 13 U.S.C. § 141(b). After receiving the Secretary’s report, Congress requires the President to send a statement that describes the results of the census and the distribution of Representative seats. 2 U.S.C. § 2a; 13 U.S.C. § 141(b).

II. The Freedom of Information Act

Congress declared “the policy of the United States that the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government.” Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (Sept. 13, 1976) (codified at 5 U.S.C. § 552b note). It believes that “government should conduct the public’s business in public.” *Clark-Cowlitz Jt.*

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Operating Agency v. FERC, 775 F.2d 359, 359 (D.C. Cir. 1985) (quotations omitted). Congress does not allow “agencies to cloak the decisional process in secrecy” because allowing that secrecy erodes “popular confidence in government, dampens well-informed public debate, and diminishes governmental accountability to the electorate.” *Id.* at 360.

Against that background, Congress enacted FOIA “to ensure [that] an informed citizenry, vital to the functioning of a democratic society” could “check . . . corruption and . . . hold the governors accountable to the governed.” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). Therefore, FOIA “require[s] agencies to adhere to a general philosophy of full agency disclosure,” so as “to open agency action to the light of public scrutiny.” *U.S. Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989) (citations and quotations omitted).

Mechanically, when “any person” requests agency “records” and “reasonably describes” them, FOIA requires the agency to “make the records promptly available.” 5 U.S.C. § 552(a)(3)(A). FOIA contains strict timelines. It requires the responding agency to provide, within twenty business days, a determination of which documents it will produce. 5 U.S.C. § 552(a)(6)(A)(i); *Citizens for Responsibility & Ethics v. FEC*, 711 F.3d 180, 188-89 (D.C. Cir. 2013) (*CREW*). Agencies can refuse to produce documents only if an exemption applies. *See* 5 U.S.C. § 552(b); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975) (“As [FOIA] is structured, virtually every document generated by an agency is available to the

public in one form or another, unless it falls within one of [FOIA's] nine exemptions.”). Otherwise, FOIA requires prompt production. 5 U.S.C. § 552(a)(3)(A).

Under narrow circumstances, FOIA allows courts to give agencies more time to produce documents. If an agency “can show exceptional circumstances” and “is exercising due diligence in responding,” the court can “retain jurisdiction and allow the agency additional time to complete its review of the records.” 5 U.S.C. § 552(a)(6)(C)(i), (ii). But delays “from a predictable agency workload of [FOIA] requests” do not qualify as “exceptional circumstances” unless the agency “demonstrates reasonable progress in reducing its backlog of pending requests.” *Id.*

FOIA requires no follow-up from the requesting party to exhaust its administrative remedies. Instead, after the time periods pass, FOIA deems the requesting party to have exhausted its administrative remedies. *Id.* § 552(a)(6)(C)(i). “If the agency does not adhere to FOIA’s explicit timelines, the ‘penalty’ is that the agency cannot rely on the administrative exhaustion requirement to keep cases from getting into court.” *CREW*, 711 F.3d at 189.

FACTUAL BACKGROUND

The Census Bureau announced its apportionment on April 26, 2021. 2020 Census Apportionment Results Delivered to the President, Press Release, ECF No. 1-2. That Press Release stated, “Secretary Raimondo delivered to President Biden the population counts to be used for apportioning the seats in the U.S. House of Representatives.”

Three weeks later, in May 2021, Citizens requested the 2021 Report under FOIA from the Census Bureau.¹ In June 2021, the Census Bureau informed Citizens that, contrary to its press release, it did not possess the 2021 Report, so it forwarded the request to the U.S. Department of Commerce. Letter from Vernon E. Curry, FOIA/Privacy Act Officer Chief, to Jared Pettinato (June 8, 2021), ECF No. 1-4.

Citizens did not wait. In July 2021, it sent another FOIA request directly to the U.S. Department of Commerce. Request Confirmation, FOIA Online, DOC-OS-2021-001781 (July 12, 2021), ECF No. 1-5. Commerce transferred that request to the Immediate Office of the Secretary. FOIA Tracking Number Change for request DOC-OS-2021-001781 (to DOC-IO-2021-001781) (July 13, 2021), ECF No. 1-6.

With now two FOIA requests before Commerce, Citizens waited patiently for over a year. In August 2022, it reached out to ask why Commerce had not produced the 2021 Report. Email String among Jared Pettinato, Bobbie Parsons FOIA Officer, Immediate Office of the Secretary, Office of Privacy and Open Government,

¹ The request stated:

Under [FOIA], Citizens for Constitutional Integrity . . . is requesting copies of the following documents from the Census Bureau. Under 13 U.S.C. § 141(b), the United States Code requires the Secretary of Commerce to deliver “The tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several States [and it] shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States.” On April 26, 2021, the Census Bureau issued press release CB21-CN.30, in which it stated, “2020 Census Apportionment Results Delivered to the President.” <https://www.census.gov/newsroom/press-releases/2021/2020-censusapportionment-results.html>. Please provide a copy of the documents sent to the President.

Request Confirmation, ECF No. 1-3.

and Khadija Khaalis, FOIA Analyst, U.S. Department of Commerce Office of Privacy and Open Government (Aug. 31-Oct. 21, 2022), ECF No. 1-7. Commerce gave Citizens the runaround. *See id.*

Citizens could have sued immediately. In September 2022, Citizens appealed from Commerce’s failure to produce the 2021 Report. Preview Appeal (Sept. 20, 2022), ECF No. 1-8; Appeal Confirmation (Sept. 20, 2022), ECF No. 1-9. Still, Commerce has still not produced the 2021 Report.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 56(b) allows a party to “file a motion for summary judgment at any time until 30 days after the close of all discovery.” *See Jeffries v. Barr*, 965 F.3d 843, 848 (D.C. Cir. 2020) (remarking that the Department of Justice’s early-filed summary judgment motion “may well” surprise the plaintiff). Courts consider claims on summary judgment if the evidence “shows that there is no genuine [issue] as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).

STANDING

Citizens have met the Article III standing requirements. “Anyone whose request for specific information has been denied has standing to bring an action.” *Zivotofsky v. Sec’y of State*, 444 F.3d 614, 617 (D.C. Cir. 2006).

ARGUMENT

In two years, Commerce has never issued a determination on whether it would produce the 2021 Report, and it never produced that report in response to two FOIA requests. “FOIA requires that the agency make the records ‘promptly available,’ Pl.’s Mem. of P&A in Supp. of its Mot. for Summ. J. *Citizens for Constitutional Integrity v. U.S. Dep’t of Commerce*, 1:23-cv-1481

which depending on the circumstances typically would mean within days or a few weeks of a ‘determination,’ not months or years.” *CREW*, 711 F.3d at 188. Taking two years to produce a single document exceeds all definitions of “promptly available.” *See id.*; 5 U.S.C. § 552(a)(4).

This Court can enjoin Commerce from withholding the document. It “has jurisdiction to enjoin the agency from withholding agency records and to order the production of any [1] agency records [2] improperly [3] withheld from the complainant.” 5 U.S.C. § 552(a)(3)(A); *GTE Sylvania*, 445 U.S. at 384. This situation easily meets that test, and Commerce cannot carry its burden of demonstrating otherwise. *See U.S. Dep’t of Justice*, 492 U.S. at 142 n.3 (“The burden is on the agency to demonstrate, not the requester to disprove, that the materials sought are not ‘agency records’ or have not been ‘improperly’ ‘withheld.’”).

The 2021 Report qualifies as an agency record. Documents qualify as “agency records” when (a) an agency “either create[s] or obtain[s]” the document, and (b) the document came “into the agency’s possession in the legitimate conduct of its official duties.” *Id.* at 144-45. A statute required the Secretary to send the 2021 Report to the President, so Commerce has no basis for denying its existence. *See* 13 U.S.C. § 141. The 2021 Report qualifies as an agency record because (a) Commerce created the document and because (b) it obtained that document while completing the duties Congress assigned. *U.S. Dep’t of Justice*, 492 U.S. at 144-45.

Commerce improperly withheld the 2021 Report. Two years of producing no determination and no document demonstrates the production has not been prompt.

See 5 U.S.C. § 552(a)(3)(A). That qualifies as improper. *See CREW*, 711 F.3d at 189. FOIA “does not allow agencies to keep FOIA requests bottled up for months or years on end while avoiding any judicial oversight.” *Id.* at 190; *Judicial Watch, Inc. v. U.S. Dep’t of Homeland Sec’y*, 895 F.3d 770, 781 (D.C. Cir. 2018) (“unreasonable delay in disclosing non-exempt documents is an abuse of FOIA’s scheme” (quotations and alteration omitted)).

For the last element, Commerce withheld the 2021 Report. Commerce would lack credibility if it claimed it did not hold the 2021 Report in May 2021. *See U.S. Dep’t of Justice*, 492 U.S. at 149. In this age of electronic documents, it would have no basis for contending that it does not possess the 2021 Report.

Because this case meets 5 U.S.C. § 552(a)(3)(A), FOIA compels enjoining Commerce from further withholding the 2021 Report, and mandating Commerce to produce that report to Citizens immediately.

CONCLUSION

For the foregoing reasons, Federal Rule of Civil Procedure 56 compels summary judgment in Citizens’ favor.

Dated May 25, 2023,

/s/ Jared S. Pettinato
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