



**Judicial  
Watch**

*Because no one  
is above the law!*

March 26, 2013

**VIA CERT MAIL & FAX: (816) 350-5785**

FOIA/PA Appeals Office  
U.S. Citizenship & Immigration Services  
150 Space Center Loop, Ste. 500  
Lee's Summit, MO 64064-8010

**Re: Appeal of FOIA Denial of Records of Expansion of Service Center Hours**

Dear FOIA Appeals Officer:

This letter timely appeals a March 15, 2013 denial<sup>1</sup> of Judicial Watch's January 10 request<sup>2</sup> for records regarding the U.S. Citizenship & Immigration Services (USCIS) expansion of call center hours at its National Customer Service Center (NCSC) beginning January 12, 2013. The request, filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, sought, *inter alia*, "all records concerning, referring, or relating to USCIS's expansion of NCSC hours, including [a]ll audio, video, and written communications (including powerpoint slides) regarding the planning and execution of the expansion."

The time frame contemplated by the request was the date on which USCIS undertook the current NCSC expansion (the date of which was not specified in USCIS's announcement of the delivery of a final product) through the date on which USCIS began its actual search for records responsive to the request. As USCIS's search and production fell far short of what FOIA requires in withholding public records and in justifying the decision to do so, Judicial Watch challenges the determination as explained below.

**I. Pertinent Authority**

Courts have consistently adjudged a FOIA search as legally adequate where "the agency makes a good faith effort to conduct a search for the requested records, using

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<sup>1</sup> USCIS's March 15, 2013 denial is here attached as Exhibit A.

<sup>2</sup> Judicial Watch's January 10, 2013 request is here attached as Exhibit B.

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methods which can be reasonably expected to produce the information requested." *Cooper v. U.S. Dep't of Justice*, 2012 U.S. Dist. LEXIS 128715, 11-12 (D.D.C. Sept. 11, 2012)(further citation and internal quotation marks omitted). To that end, "[t]he agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested and it must pursue any leads to responsive records that are both clear and certain." *Id.* "Ultimately, the adequacy of the search is judged by a standard of reasonableness and depends, not surprisingly, upon the facts of each case." *Id.*

*A. Dearth of Production Strongly Suggests a Faulty Search of Record Locations*

While the dearth of an agency's production is not generally deemed conclusive evidence of an inadequate FOIA search, the context of the present case increases the probative value of such a paltry response. A good case for comparison is *Miccosukee Tribe of Indians of Fla. v. United States*, 516 F.3d 1235, 1252 (11th Cir. 2008). In *Miccosukee*, the Environmental Protection Agency (EPA) could not prove beyond material doubt that its search was reasonable following the Tribe's deposition of certain employees involved in the search. The depositions – in contrast with an earlier affidavit of the FOIA supervisor – revealed an internal policy choice that the agency had unilaterally imposed during the course of the search. The policy choice – unsupported by statute, as the court held -- construed the Tribe's request narrowly despite explicit language to the contrary in the statute, the weight of jurisprudential authority, and the FOIA petition itself. The Tribe was alerted to the agency's scheme by virtue of the alarmingly small size of its production. When a search that should have yielded a substantial number of documents produced a mere two and a half boxes, an inference could be drawn that the search was woefully inadequate in some way.

*B. USCIS Likely Unreasonably Limited Its Search by Time as well as Location*

An agency's "duty under the FOIA is to conduct a search reasonably calculated to uncover all relevant documents." *Ctr. for Biological Diversity v. Office of the U.S. Trade Representative*, 2011 U.S. App. LEXIS 19197 (9th Cir. Sept. 16, 2011)(citing 5 U.S.C. § 552(a)(3)(C)-(D)). "Relevance is measured with respect to which records were requested." *Id.* Hence, where, as in *Biological Diversity*, an agency confined its search to the period of time during which the most intense discussion on a topic occurred rather than exploring all records maintained during the full timeframe specified by the requester's FOIA, the agency failed to meet its probative burden, forcing the court to

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agree with plaintiff that the agency's search was inherently deficient and unreasonable within the meaning of FOIA.

Turning to the instant case, Judicial Watch's request sought all documents dating onward from the inception of the agency's plan to expand call center hours. As the agency did not reveal when that date was in its announcement of the expansion, the agency must be trusted to admit the date such planning started and begin its search for responsive documents at that point.

Given the fact that USCIS was mounting a new initiative during the relevant period, and that all the FOIA topics requested by Judicial Watch match the ordinary criteria by which such programs are evaluated, USCIS would be hard pressed to prove "beyond material doubt" on the basis of this rate of production that it honestly searched in all likely locations for the full period requested.

### *C. Location and Pursuit of Emergent Leads*

In addition to its temporal aspect, each search for responsive records has a spatial component. That is, in crafting an adequate search, FOIA staff must rely on its combined, informed judgment to develop a viable plan for canvassing the most likely location of items requested. To that end, while "the agency generally need not search every record system, an agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested." *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 28 (D.C. Cir. 1998) (further citation and internal punctuation omitted). *Accord, Valencia-Lucena*, 180 F.3d at 325 (requiring "agencies to make more than perfunctory searches and, indeed, to follow through on obvious leads to discover requested documents").

Hence, where, as in *Campbell*, an agency refuses to revise its search in light of new leads revealed by the search itself, the search – for FOIA purposes -- is necessarily unreasonable. This is because "the court evaluates the reasonableness of an agency's search based on what the agency knew at its conclusion rather than what the agency speculated at its inception." *Campbell*, 164 F.3d at 28.

## **II. Factual Analysis**

In response to Judicial Watch's request, USCIS provided a two-page email in which the agency answered six questions about the expansion from the contractor

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designated to field the calls. The contents of this email strongly suggest that the expansion did not occur on the basis of this email alone. It can further be deduced that the expansion did not occur spontaneously without any planning or direction from leadership at either the agency level or beyond. That being the case, a two-page production is woefully inadequate, pointing to a legally deficient search for responsive records in the agency's possession.

Additionally, the date of the contractor's email being so close to USCIS's announcement, it must be the case that the agency did not start its search far enough back to capture the planning dialogues that perforce preceded the expansion.

**III. Request for Relief**

In light of the foregoing, Judicial Watch asks that USCIS compel appropriate personnel to correct its initial determination by:

- A. Crafting a search likely to locate *all* responsive records;
- B. Promptly executing that search in a reasonable manner, including pursuit of any logical leads;
- C. Releasing all responsive documents or, in narrow instances, supplying particularized justification for continuing to withhold whatever specific portions the agency can establish are exempt from USCIS's overarching duty to disclose.

Additionally, Judicial Watch anticipates receipt of the renewed production in electronic format at no further expense to itself in accordance with 5 U.S.C. §§ 552 (a)(6)(A)(i) and (a)(4)(A)(viii).<sup>3</sup> Thank you in advance for your thoughtful consideration of this appeal.

Respectfully submitted,



Lisette Garcia, J.D.  
Senior Investigator

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<sup>3</sup> 5 U.S.C. § 552 (a)(6)(A)(i) provides for determination of a FOIA request within 20 days and 5 U.S.C. § 552 (a)(4)(A)(viii) provides for the waiver of all fees if the requested documents are not timely produced.



U.S. Citizenship  
and Immigration  
Services

March 15, 2013

COW2013000023

Lisette Garcia  
Judicial Watch  
425 Third St. SW, STE 800  
Washington, DC 20024

Dear Lisette Garcia:

This is in response to your Freedom of Information Act/Privacy Act (FOIA/PA) request received in this office January 18, 2013 regarding Expansion of USCIS Service Center Hours.

You have requested, and the component who heads the NCSC has responded below:

- 1) All training materials provided to new NCSC call takers;
  - Response: The pilot uses existing staff; no additional call takers are involved. Scripts used by call takers are available on the USCIS Web site on the Electronic Reading Room.
- 2) Invoices for all additional technology and equipment acquired or leased in support of the expansion;
  - Response: This pilot uses existing resources; no additional technology or equipment is being acquired.
- 3) Contracts for all additional office space acquired or leased to accommodate additional workers;
  - This pilot uses existing facilities; no additional space is being acquired.
- 4) SF-50s for all personnel associated with the expansion;
  - This expansion of hours is at the Tier 1 level only, which is staffed by contractor call takers, no Federal Employees are affected by this expansion.
- 5) All audio, video, and written communications (including PowerPoint slides) regarding the planning and execution of the expansion;
  - The requirement to open on the weekend at USCIS request is built into the Tier 1 contracts. The direction to open on weekends was handled telephonically without written communication. We are providing the only email on the subject when the USCIS Contracting Office responded to some questions from the Tier 1 vendors. (see attached)
- 6) All records reflecting the total cost of the expansion to the American taxpayer.
  - Planning did not anticipate any additional cost as a result of the expansion. This expansion is for Tier 1 only. The Tier 1 vendors are paid by calls taken not the hours worked. We don't believe this pilot will result in additional calls to the NCSC. Our working assumption is that the calls handled on Saturday would have been made during our weekday hours if Saturday hours were not available. However, if we are mistaken and there are additional expenses, none will be borne by the American taxpayers. The NCSC is totally funded by applicant fees paid to USCIS.

Additionally we have been provided one email (question 5) which is being provided. We have completed the review of all documents responsive to your request and have identified two pages which are responsive to your request. Enclosed are one page released in its entirety, and one page released in part. We have reviewed and have determined to release all information except those portions that are exempt pursuant to 5 U.S.C. § 552 (b)(6) of the FOIA. All documents provided are the best copies available.

- Exemption (b)(6) permits the government to withhold all information about individuals in personnel, medical and similar files where the disclosure of such information would constitute a clearly unwarranted invasion of personal privacy. The types of documents and/or information we have withheld may consist of birth certificates, naturalization certificates, drivers' licenses, social security numbers, home addresses, dates of birth, or various other documents and/or information belonging to a third party that are considered personal.

In accordance with Department of Homeland Security Regulations (6 C.F.R. § 5.4(a)), USCIS uses a "cut-off" date to delineate the scope of a FOIA request by treating records created after that date as not responsive to that request. Therefore, in determining which records are responsive to your request, we included only records in the possession of this agency as of 1/28/13, the date we began the search for records.

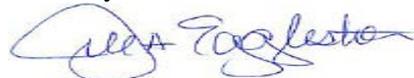
The enclosed record consists of the best reproducible copies available. Certain pages contain marks that appear to be blacked-out information. The black marks were made prior to our receipt of the file and are not information we have withheld under the provisions of the FOIA or PA.

If you wish to appeal this determination, you may write to the USCIS FOIA/PA Appeals Office, 150 Space Center Loop, Suite 500, Lee's Summit, MO 64064-2139, within 60 days of the date of this letter. Both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

The National Records Center does not process petitions, applications or any other type of benefit under the Immigration and Nationality Act. If you have questions or wish to submit documentation relating to a matter pending with the bureau, you must address these issues with your nearest District Office.

All FOIA/PA related requests, including address changes, must be submitted in writing and be signed by the requester. Please include the control number listed above on all correspondence with this office. Requests may be mailed to the FOIA/PA Officer at the PO Box listed at the top of the letterhead, or sent by fax to (816) 350-5785. You may also submit FOIA/PA related requests to our e-mail address at [uscis.foia@uscis.dhs.gov](mailto:uscis.foia@uscis.dhs.gov).

Sincerely,



Jill A. Eggleston  
Director, FOIA Operations



**Judicial  
Watch**<sup>®</sup>  
*Because no one  
is above the law!*

Exhibit B

January 10, 2013

**VIA CERT MAIL & FAX: (816) 350-5785**

FOIA Jill Eggleston  
U.S. Citizenship & Immigration Services  
P.O. Box 648010  
Lee's Summit, MO 64064-8010

**Re: FOIA Seeking Records Regarding Expansion of USCIS Service Center Hours**

Dear Ms. Eggleston:

This morning, the U.S. Citizenship & Immigration Services (USCIS) announced that beginning January 12, 2013, its National Customer Service Center (NCSC) would add Saturday hours. The announcement stated that live, toll-free assistants would be able to provide information on such routine topics as, *inter alia*, "civil surgeons." Since neither the U.S. Constitution nor the Immigration & Nationality Act of 1952 (as amended) make apparent what, if anything, the topic of civil surgeons has to do with ordering and conducting deportations or approving valid applications for legal immigration, Judicial Watch, Inc. (Judicial Watch) hereby requests that, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, USCIS produce the following within twenty (20) business days:

All records concerning, referring, or relating to USCIS's expansion of NCSC hours, including:

- 1) All training materials provided to new NCSC call-takers;
- 2) Invoices for all additional technology and equipment acquired or leased in support of the expansion;
- 3) Contracts for all additional office space acquired or leased to accommodate additional workers;
- 4) SF-50s for all personnel associated with the expansion;
- 5) All audio, video, and written communications (including powerpoint slides) regarding the planning and execution of the expansion; and,
- 6) All records reflecting the total cost of the expansion to the American taxpayer.

The time frame for this request is the date on which USCIS undertook the current NCSC expansion (the date of which was not specified in USCIS's announcement of the delivery of a final product) through the date on which USCIS shall begin its actual search for records responsive to this request.

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In placing this request, Judicial Watch directs your attention to President Barack Obama's January 21, 2009 Memorandum concerning the Freedom of Information Act which states:

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA... The presumption of disclosure should be applied to all decisions involving FOIA.

Freedom of Information Act. Pres. Mem. of January 21, 2009, 74 Fed. Reg. 4683.

The memo further provides that "The Freedom of Information Act should be administered with a clear presumption: In the case of doubt, openness prevails."

Nevertheless, if any responsive record or portion thereof is claimed to be exempt from production under FOIA, please provide sufficient identifying information with respect to each allegedly exempt record or portion thereof to allow us to assess the propriety of the claimed exemption. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). In addition, any reasonably segregable portion of a responsive record must be provided, after redaction of any allegedly exempt material. 5 U.S.C. § 552(b).

Judicial Watch also hereby requests a waiver of both search and duplication fees pursuant to 5 U.S.C. §§ 552(a)(4)(A)(ii)(II) and (a)(4)(A)(iii). Judicial Watch is entitled to a waiver of search fees under 5 U.S.C. § 552(a)(4)(A)(ii)(II) because it is a member of the news media. *Cf. National Security Archive v. Department of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989)(defining news media within FOIA context). Judicial Watch has also been recognized as a member of the news media in other FOIA litigation. *See, e.g., Judicial Watch, Inc. v. U.S. Department of Justice*, 133 F. Supp.2d 52 (D.D.C. 2000); and, *Judicial Watch, Inc. v. Department of Defense*, 2006 U.S. Dist. LEXIS 44003, \*1 (D.D.C. June 28, 2006). Judicial Watch regularly obtains information about the operations and activities of government through FOIA and other means, uses its editorial skills to turn this information into distinct works, and publishes and disseminates these works to the public. It intends to do likewise with the records it receives in response to this request.

Judicial Watch also is entitled to a complete waiver of both search fees and duplication fees pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). Under this provision, records:

shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest

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because it is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester.

5 U.S.C. § 552(a)(4)(A)(iii).

In addition, if records are not produced within twenty (20) business days, Judicial Watch is entitled to a complete waiver of search and duplication fees under Section 6(b) of the OPEN Government Act of 2007, which amended FOIA at 5 U.S.C. § 552 (a)(4)(A)(viii).

Judicial Watch is a 501(c)(3), not-for-profit, educational organization, and, by definition, it has no commercial purpose. Judicial Watch exists to educate the public about the operations and activities of government, as well as to increase public understanding about the importance of ethics and the rule of law in government. The particular records requested herein are sought as part of Judicial Watch's ongoing efforts to document the operations and activities of the federal government and to educate the public about these operations and activities. Once Judicial Watch obtains the requested records, it intends to analyze them and disseminate the results of its analysis, as well as the records themselves, as a special written report. Judicial Watch will also educate the public via radio programs, Judicial Watch's website, and/or newsletter, among other outlets. It also will make the records available to other members of the media or researchers upon request. Judicial Watch has a proven ability to disseminate information obtained through FOIA to the public, as demonstrated by its long-standing and continuing public outreach efforts.

The expansion of access to the Obama administration's quasi-legislative amnesty initiatives, made increasingly possible by NCSC's addition of Saturday hours, is of paramount public concern because it is the American taxpayer who is called on to fund the government's largesse in this respect even as such policies imperil the financial well-being and personal safety of these very taxpayers and their families. Moreover, while an agency is not obligated to abide the public's overwhelming opposition to amnesty, USCIS in this instance certainly has a duty to explain with particularity and specificity to what extent and why it has substantially departed from the general consensus of limiting public expenditure on nonessential items such as these, lest the agency's policies be discarded as arbitrary or capricious. *See, e.g., Nat'l Treas. Emps. Union v. Newman*, 768 F. Supp. 8, 12 (D.D.C. 1991) ("the letter and the spirit of the APA . . . demands 'openness, explanation, and participatory democracy'") (quoting *Weyerhaeuser Co. v. Costle*, 590 F.2d 1101, 1027 (D.C. Cir. 1978)).

Lastly, agencies have a duty not only to explain their dismissal of contrary evidence, but also any substantial departures from the government's prior position on the subject. *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mutual Automobile*

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*Ins. Co.*, 463 U.S. 29 (1983) (“agency’s view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis”). Without access to the documents Judicial Watch here requests, the Obama administration’s obstinate reliance on alternative administrative measures to circumvent the legislative process to implement amnesty will not get a proper airing and the federal government’s handling of the American taxpayer’s due process cannot be fairly evaluated.

Given these circumstances, Judicial Watch is entitled to a public interest fee waiver of both search costs and duplication costs. Nonetheless, in the event our request for a waiver of search and/or duplication costs is denied, Judicial Watch is willing to pay up to \$350.00 in search and/or duplication costs. Judicial Watch requests that it be contacted before any such costs are incurred, in order to prioritize search and duplication efforts.

In an effort to suppress costs and facilitate compliance within the statutory time limit, Judicial Watch requests that documents be produced and delivered in electronic format (e.g. e-mail, .pdfs, dvd) wherever possible. When necessary, Judicial Watch will also accept the “rolling production” of documents, a situation not likely to arise here given the exceedingly narrow scope of the instant request. Judicial Watch anticipates prompt receipt of responsive documents and a waiver of both search and duplication costs within twenty (20) business days. Your timely compliance with all relevant laws is appreciated.

Sincerely,



Lisette Garcia, J.D.  
Senior Investigator

**Greenwood, Tembra A**

**From:** Rutherford, Monica L  
**Sent:** Friday, January 04, 2013 8:56 AM  
**To:** Fernando E Pidal (fpidal@csc.com); Gilbert Duarte (gduarte3@csc.com)  
**Cc:** Rutherford, Monica L; Hatin, Christopher C; Whetstone, Zelia M; Garner, Angela L; Diggs, Adrienne M; Yuen, Chui-Ang; Jordan, Freddie G  
**Subject:** Saturday operations

**Importance:** High

Tracking:	Recipient	Read
	Fernando E Pidal (fpidal@csc.com)	
	Gilbert Duarte (gduarte3@csc.com)	
	Rutherford, Monica L	Read: 1/4/2013 8:57 AM
	Hatin, Christopher C	Read: 1/4/2013 9:02 AM
	Whetstone, Zelia M	Read: 1/4/2013 9:00 AM
	Garner, Angela L	
	Diggs, Adrienne M	
	Yuen, Chui-Ang	Read: 1/4/2013 9:49 AM
	Jordan, Freddie G	Read: 1/4/2013 8:59 AM

Fernando,

As for the request to open on Saturdays starting on 1/12/2013, below are the questions to the answers you've requested:

Can you provide us the background for this change?

The enhanced hours of operation should assist with the announcement of the 2 new USCIS processes - Immigrant Fee Process and the Provisional Unlawful Presence Waiver

Is Tier 2 going to be open on Saturday? if not, is the Tier 2 e-mail/voice-mail option available? Tier 2 will not be available on the 12th of January; we are still in discussions on the following Saturdays as well as email and voicemail options

Can USCIS provide us with a an anticipated NCSC network call volume for these Saturdays? Based on the 5 Saturdays that were open last year, we received an average of 3,452 call per Saturday.

Is the government estimating that CSC will have to staff to answer 1,726 call per Saturday? This will be approximately the amount of calls taken in the last hour 1:15 pm - 2:15 pm or about 10% of the calls taken on Veterans Day.

USCIS does not have any historical data or anticipated volume based on these processes to provide. The expectation is that the 12th of January would be staffed as a normal Friday and the data will be evaluated for the next week projections. The information in regards to expectation is for informational purposes only and does not bind the government to an expected or anticipated number of calls.

Are both vendors going to be open on Saturdays?

The expectation is that both vendors will be available.

(b)(6)

Exhibit C

What are the hours of operations?

The centers would be open from 9am to 5pm in each time zone.

Monica L. Rutherford

Associate Chief, USCIS Contracting Office Contract Administration Division PH 802-872-4644 FAX 802-951-6455

BlackBerry [REDACTED]

Email: [monica.L.rutherford@uscis.dhs.gov](mailto:monica.L.rutherford@uscis.dhs.gov)

<http://connect.uscis.dhs.gov/org/MGMT/procurement/Pages/RequisitionsinProcess.aspx>