UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JON R. ROGERS Plaintiff, v. EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS Defendant.	)	Civil Action No. 18-454 (RBW)

PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS (DOCUMENT #6)

Pursuant to Federal Rule of Civil Procedure 56, Plaintiff moves for summary judgment in his favor. In support of this Motion, Plaintiff respectfully refers the Court to the accompanying Memorandum in Support of Plaintiff's Cross-Motion for Summary Judgment and Response in Opposition to Defendant's Motion to Dismiss and for Summary Judgment and Plaintiff's Statement of Material Facts as to Which There Is No Genuine Dispute.

Dated: July 13, 2018

Respectfully submitted,

/s/ Robert J. Olson

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UNITED STATES DISTRICT COURT
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JON R. ROGERS	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 18-454 (RBW)
	)	
EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS	)	
	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND FOR SUMMARY JUDGMENT (DOCUMENT #6)

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BACKGROUND

For years, multiple agencies of the federal government conducted at least two lengthy criminal investigations into Defendant's activities. However, Defendant was never charged with any crime. Regardless, the IRS seized millions of dollars of Defendant's assets, and refused to return them until Defendant signed a release waiving certain rights, and forfeiting a portion of his money. Maintaining that he had done nothing wrong and, understandably, desiring to know why he had been targeted by his government, Plaintiff filed a Freedom of Information Act ("FOIA") request for relevant records with Defendant, Executive Office for United States Attorneys ("EOUSA"), in November of 2012.

Under FOIA, every "agency" shall make "available to any person" for "public inspection" all agency records that are not privileged from disclosure under one of FOIA's nine statutory exemptions. *See* 5 U.S.C. § 552(a)(2), (a)(3)(A). FOIA was enacted "to establish a general philosophy of full agency disclosure." Environmental Protection Agency v. Mink, 410 U.S. 73, 80 n.6 (1973); Dep't of the Air Force v. Rose, 425 U.S. 352, 361-62 (1976). An agency has the burden of proving that its decision to withhold a record responsive to a FOIA request is justified. *See* 5 U.S.C. § 552(a)(4)(B).

Defendant has admitted that it has numerous records that are responsive to Plaintiff's FOIA request. Compl. ¶ 20. Yet, in more than five years, Defendant has stonewalled Plaintiff's effort, producing no records and making no claim to any statutory exemption for withholding any of the records sought by Plaintiff. Rather, Defendant now notes that the November 2012 Settlement Agreement with the IRS[1] bars Plaintiff's action. Memorandum in Support of Defendant's Motion to Dismiss and for Summary Judgment ("Def. Mot.") at 5.

[1] *See* Defendant's Statement of Material Facts as to Which there Is No Dispute, ¶ 2.

On February 26, 2018, Plaintiff filed a Complaint in this Court, seeking to compel disclosure of the requested records (ECF #1). On May 31, 2018, Defendant filed a motion to dismiss and for summary judgment (ECF #6), and accompanying memorandum (ECF #6-1). Plaintiff opposes Defendant's motion, for the reasons stated herein. Additionally, Plaintiff hereby moves for summary judgment, and submits the following Memorandum of points and authorities in support, as well as his own Statement of Undisputed Facts and proposed form of Order. Plaintiff asks that this Court deny Defendant's motion for summary judgment, grant summary judgment in Plaintiff's favor, and order the relief requested in Plaintiff's Complaint.

REQUEST FOR ORAL ARGUMENT

Pursuant to local rule 7(f), Plaintiff respectfully requests oral argument on the above motions. Given the importance of these questions to the determination of this case, and the complexity of this area of law, Plaintiffs believe that the Court's decision-making process would be significantly aided by oral argument.

ARGUMENT

I. ACCORDING TO PRICE v. UNITED STATES DOJ ATTY. OFFICE, THE RELEASE IN THE SETTLEMENT AGREEMENT DOES NOT BAR PLAINTIFF'S CLAIMS.

Defendant asserts that Plaintiff's action is barred by the 2012 Stipulation and Settlement Agreement ("Settlement Agreement"). *See* Def. Mot. at 5. However, just last year, the U.S. Court of Appeals for the D.C. Circuit decided Price v. United States DOJ Atty. Office, 865 F.3d 676 (D.C. Cir. 2017), reh'g *en banc* denied 2017 U.S. App. LEXIS 24962, (Dec. 11, 2017), rejecting virtually the same defense asserted by the government in this case. In Price, a criminal

defendant signed a plea agreement in which he agreed specifically to waive his rights to request records under the FOIA. *Id.* at 678. Thereafter, he filed and sought to litigate a FOIA request for records relating to the government's case against him. *Id.* The government argued that he had waived his right to sue under FOIA based on the plea agreement, but the Court of Appeals found the waiver unenforceable as a matter of public policy. *Id.* at 683. Although the court stopped short of finding that FOIA rights never can be waived, it nevertheless concluded that the government had "failed to identify any legitimate criminal-justice interest served by the waiver." *Id.* at 678. Thus, Plaintiff understands Price to require that, whenever the government seeks to enforce the waiver of FOIA rights in a criminal matter, it must demonstrate a compelling criminal justice reason for doing so.[2] In this case, however, the government has offered no reason whatsoever supporting its invocation of the 2012 Settlement Agreement. Rather, the government makes only the conclusory assertion that "the Settlement Agreement bars Plaintiff's claims." Def. Mot. at 5.

Surprisingly, the government fails to even mention Price in its motion, even though that decision appears to be directly adverse to the government's position here. Rather than address or even cite Price, the government relies on a decision from a district court in Ohio, and one from

[2] Currently before another judge of this Court is United States v. Alex Van Der Zwaan, No. 18-cr-31, in which the government filed a "notice" with the court, attempting to demonstrate that, pursuant to Price, there were "legitimate criminal-justice interests for the waiver." The government's "interests" asserted in that case, involving an "ongoing investigation," do not apply here, as this case involves a criminal investigation now many years concluded. *See* 18-cr-31, ECF #26.

the Sixth Circuit.[3] Def. Mot. at 6-7, 10-11. The government's failure to advise the Court of Price makes its analysis incomplete at best, and perhaps even misleading.[4] *See* Def. Mot. at 5-6.

It is true that, unlike the criminal defendant in Price, Plaintiff's physical freedom is not now in jeopardy, because the government did not bring charges against him. But that one factual difference between the cases pales in comparison to the reasons why Price clearly has application here.

In Price, the government asserted that the FOIA waiver promoted **finality**, but the court rejected that argument with a bit of humor, explaining that "FOIA waivers promote finality only by making it more difficult for criminal defendants to uncover exculpatory information....." *Id.* at 682. Likewise here, it is no secret that Plaintiff seeks to discover how and why the government targeted him, unfairly in his opinion, over the course of many years. There is no legitimate government interest in withholding this type of information. Indeed, as the Price court noted, "FOIA ... provides an important vehicle for vindicating significant rights — and for **keeping prosecutors honest**. Indeed, in some cases, it provides **the *only* vehicle**." *Id.* at 682 (emphasis added). Here, this very same important policy reason supports allowing Plaintiff access to the records he seeks.

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[3] Defendant first asserts that "multiple other courts" support its position, but then revises that figure down to "two other courts." Def. Mot. at 1. Regardless, neither the Sixth Circuit nor another district court can bind this Court, but Price is relevant and binding.

[4] Price reflected a clear change of the law in this Circuit. Before Price, district court judges appear to have routinely upheld denials of FOIA requests based on plea agreement waivers. *See, e.g.*, Caston v. Exec. Office for the United States Attys., 572 F. Supp. 2d 125 (D.D.C. 2008); Thyer v. United States DOJ, 2013 U.S. Dist. LEXIS 4400 (D.D.C. 2013); Scholl v. Various Agencies of the Fed. Gov't, 2016 U.S. Dist. LEXIS 129421 (D.D.C. 2016).

Further, in Price, the plea agreement signed by the criminal defendant specifically mentioned and waived his FOIA rights.[5] Here, however, there was no express FOIA waiver, only a general waiver without any specific FOIA reference.[6] *See* Def. Mot. at 2.

Finally, the Price court noted the danger of "the ... **potential for abuse of prosecutorial bargaining power** [and noted] this uneven power dynamic lurks in the background in cases like these...." *Id.* at 683 (emphasis added). In this case, the presence of that unequal bargaining power was far more than "lurking" — it was painfully obvious. Indeed, only by signing the 2012 Settlement Agreement, was Plaintiff finally able to obtain the return of millions of dollars of assets that the government had seized and had refused to return.

In this case, the only government interest that would be protected by enforcing the terms of the 2012 Settlement Agreement is concealment of the federal government's actions — actions that led to an agreement by Plaintiff to sacrifice a large sum of money in order to obtain the return of the remainder of his seized assets, with no charges brought. This would permit the government in the future essentially to tell defendants "we'll promise not to prosecute you, but only if you first agree that you can never find out why we targeted you." Under the Price decision and the FOIA statute, the government has no legitimate reason to withhold the records

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[5] In pertinent part, the Price plea agreement waived rights to "including, without limitation, any records that may be sought under the Freedom of Information Act...." *Id.* at 678 n.2.

[6] In pertinent part, the Settlement Agreement states: "Jon R. Rogers, his assigns, and heirs, hereby unconditionally release and forever discharge the United States ... from and against any and all manner of claims, actions, causes of action, rights, set-offs, promises, allegations, expenses, assessments, penalties, charges, injuries, losses, costs, obligations, duties, suits, proceedings, debts, dues, contracts, judgments, damages, claims, counterclaims, liabilities and/or demands of every kind, character and manner whatsoever in law or equity, administrative or judicial, contract, tort (including negligence of all kinds) or otherwise, whether known or unknown, claimed or unclaimed, asserted or unasserted, suspected or unsuspected, discovered or undiscovered, choate or inchoate, accrued or unaccrued, anticipated or unanticipated, contingent or fixed, for, upon, or by reason of any and all matters whatsoever, related to and/or in connection with or arising out of these Forfeiture Actions."

Plaintiff seeks. If the child pornographer in Price deserves the protections of the FOIA, even after expressly waiving them, it seems more than obvious that Plaintiff — who was never charged with a crime, and whose release never even mentioned FOIA — deserves at least those same protections.

II. DEFENDANT KNOWINGLY, VOLUNTARILY, AND EXPRESSLY WAIVED RELIANCE ON THE SETTLEMENT AGREEMENT.

Additionally, the government should not be permitted to invoke the 2012 Settlement Agreement to justify its refusal to process Plaintiff's FOIA request, because the government knowingly, voluntarily, and expressly (in writing) waived its reliance on the Settlement Agreement, in the DOJ's Office of Information Policy ("OIP") 2016 decision to grant Plaintiff's appeal.

Waiver in this circuit is defined as "the 'intentional relinquishment or abandonment of a known right.'" United States v. Philip Morris, Inc., 300 F. Supp. 2d 61, 68 (D.D.C. 2004). The traditional elements of all waivers are: (1) an "existing right;" (2) "knowledge" of the right; and (3) "the intention of forgoing it." Black's Law Dictionary, 8th Edition, Thompson West (2004), p. 1611. Each of these elements is present here.

First, Defendant asserts that the 2012 Settlement Agreement between the United States and Plaintiff constitutes a clear agreement between the parties, pursuant to which Plaintiff was not entitled to submit his FOIA request. Def. Mot. at 5-6. However, assuming *arguendo* that Defendant at one time could have relied on the terms of the Settlement Agreement in order to bar Plaintiff's FOIA request here, that defense was waived in 2016.

Second, it is indisputable that Defendant knew of the existence of the Settlement Agreement when it waived its application. Indeed, EOUSA's September 26, 2016 denial letter explicitly referenced the Settlement Agreement as the reason for denying Plaintiff's request. Compl. ¶ 27. And clearly, the OIP was aware of the Settlement Agreement, as the DOJ's website points out that all administrative appeal reviews by the OIP are conducted with full access to and review of all relevant documents associated with a FOIA request.[7]

Third, Defendant waived reliance on the Settlement Agreement by its December 22, 2016 letter granting Plaintiff's appeal. Moreover, the OIP acknowledged that it had consulted with EOUSA prior to ruling, and deliberately chose to waive the agency's rights under the Settlement Agreement, by remanding and ordering EOUSA to process Plaintiff's FOIA request. Complaint ¶ 29, Exhibit 14. Defendant's letter granting Plaintiff's appeal even contemplated and acknowledged his right "to file a lawsuit in federal district court," a right that Defendant now denies. Exhibit 14, p. 2. Additionally, EOUSA acknowledged the OIP's decision to remand Plaintiff's request, noting that the request had been "reopened" and "assigned" a new tracking number. *See* Exhibit 17.

What's more, even before the December 2016 grant of Plaintiff's administrative appeal, EOUSA waived its right to raise the 2012 Settlement Agreement because, ever since the beginning of its review of Petitioner's FOIA request, EOUSA has acted in a manner inconsistent with reliance on the former Settlement Agreement, which it now belatedly asserts. The EOUSA accepted the Petitioner's FOIA request, responded to it, and accepted payment in exchange for the search and duplication of responsive records. Complaint ¶¶ 18-21. EOUSA represented that

[7] https://www.justice.gov/open/appeals.

the records "**will be** released" after Defendant paid $548.00. Complaint ¶ 20 (emphasis added). All the while, the EOUSA failed to assert a belief that Petitioner's FOIA claim should be barred by the 2012 Settlement Agreement.

To be sure, the Supreme Court has placed an important limit on waiver by government, in that "a waiver of **sovereign authority** will not be implied, but instead must be 'surrendered in **unmistakable terms**.'" United States v. Cherokee Nation of Oklahoma, 480 U.S. 700 (1987) (emphasis added). However, as with equitable estoppel (discussed in Section III, below), this doctrine is limited to protecting the government from situations in which waiver would prevent the government from enforcing the law, such as its duty "to ensure that such waters remain free to interstate and foreign commerce." Cherokee Nation at 707; *see also* Bowen v. Public Agencies Opposed to Soc. Sec. Entrapment, 477 U.S. 41, 52 (1986). Such concerns are not present in this case. More importantly and more simply, though, the waiver in this case was in "unmistakable terms," thus meeting the Cherokee Nation requirement in the first place.

There is no other way to understand the facts of this case but to conclude that Defendant has knowingly and expressly waived its reliance on the 2012 Settlement Agreement. The waiver was made by a government official with the responsibility to decide and full power to grant Plaintiff's appeal and to make such a waiver, under both the statute and DOJ regulations.[8] The waiver was fully informed, with complete knowledge of the Settlement Agreement, the government's rights thereunder, the previous Ohio litigation, the legal arguments on both sides of

[8] The Court of Federal Claims has held that "[t]he Government waiver of a contract provision requires a decision by a **responsible officer** assigned the function of overseeing the essentials of contract performance, not just any Federal employee or officer whose work happens to be connected with the contract. Such a waiver by one with such authority will estop the Government." Gresham & Co. v. United States, 470 F.2d 542, 543 (Ct. Cl. 1972).

the issue, and "after carefully considering [Plaintiff's] appeal." Moreover, the waiver was made in consultation with EOUSA, which must have agreed to the waiver and agreed to process Plaintiff's FOIA request. Compl. ¶ 29.

Since December 2016, when the OIP waived the right to assert the Settlement Agreement, the government's position has now, for some reason, changed. However, Defendant should not now be permitted to revive that document. Indeed, given its December 2016 decision, the Government's cannot now in good faith claim reliance on the Settlement Agreement.

III. THE GOVERNMENT SHOULD BE EQUITABLY ESTOPPED FROM RELIANCE ON THE 2012 SETTLEMENT AGREEMENT.

Defendant has gone to great lengths to characterize Plaintiff's claims as little more than a weak equitable estoppel argument, designed to circumvent the release contained in the August 2012 Settlement Agreement. Def. Mot. at 6-9. However, Plaintiff's claims here arise from his 2013 contract with the government and its subsequent statements and actions, not from his November 2012 FOIA request, or from the 2012 Settlement Agreement. *See* Compl. ¶¶ 28, 29, 32, 33. However, since Defendant decided to raise the issue of equitable estoppel, Plaintiff believes it is worth discussing because, even if this Court decides that the Settlement Agreement is relevant to the claims brought here, the government should indeed be estopped from reliance upon the Settlement Agreement, having expressly disclaimed such reliance by granting Plaintiff's administrative appeal in 2016.

Generally, "[t]he doctrine of equitable estoppel precludes a litigant from asserting an otherwise valid claim or defense where the other party has detrimentally altered its position in reasonable reliance on the former's misrepresentation or failure to disclose a material fact."

Woodstock/Kenosha Health Center v. Schweiker, 713 F.2d 285, 289-90 (7th Cir. 1983). As the government correctly points out, equitable estoppel is neither a claim nor a defense, but a "shield" that prevents another party from raising a claim or defense. Def. Mot. at 7. In light of the government's repeated promises and affirmative actions to the contrary, the shield of equitable estoppel should preclude the government from raising the Settlement Agreement as a defense to Plaintiff's claims.

To be sure, the Supreme Court has made clear that, "[f]rom our earliest cases, we have recognized that equitable estoppel will not lie against the Government as against private litigants. OPM v. Richmond, 496 U.S. 414, 419 (1990). Nevertheless, as this Court has noted, the doctrine still "'applies to government agencies, as well as private parties,'" even if, admittedly, there is a "presumption" against its application in that context. United States v. Honeywell, 841 F. Supp. 2d 112, 114 (D.D.C. 2012). There are good reasons it should apply here.

A. The Typical Concerns with Equitable Estoppel against the Government Are Not Present Here.

Traditionally, "[t]he key factor distinguishing estoppel of government, rather than private, entities is the risk of waiving the requirements of congressional enactments of public policy." Woodstock at 290. As the Tenth Circuit has explained, in many contexts equitable estoppel against the government might "frustrate the purpose of the statutes expressing the will of Congress or unduly undermine the enforcement of the public laws." FDIC v. Hulsey, 22 F.3d 1472, 1489 (10th Cir. 1994). Thus, for example, the Supreme Court has rejected parties invoking equitable estoppel against the government when "there was no statutory authority for the issuance of the bills," to prevent payment of benefits "not otherwise permitted by law," where the

government needed to "prevent erection of power houses and transmission lines across a public forest in violation of a statute," and from "'enforcing a statutorily imposed requirement for retirement eligibility.'" Richmond at 416, 418, 420 (emphasis added).

Unlike the situations presented in such cases, Plaintiff seeks only to have Defendant respond to a five-year-old FOIA request. Here, there is no statute prohibiting Defendant from processing Plaintiff's request, nor would doing so frustrate any federal regulation (such as "statutory exhaustion requirements" (*see* Rann v. Chao, 346 F.3d 192 (D.C. Cir. 2003)) or enforcement policy. If anything, the FOIA statute **requires** Defendant to process FOIA requests. 5 U.S.C. § 552. Moreover, "[a]ll agencies should adopt a presumption in favor of disclosure."[9] In other words, the legal reasoning behind the general rule exempting the government from equitable estoppel simply does not apply in this case — rather, it cuts the other way.

B. The Elements for Equitable Estoppel Are Met Here.

Under the test laid out by this Circuit, in order to obtain equitable estoppel against the government, Plaintiff must show four things: "(1) 'there was a "definite" representation to the party claiming estoppel,' (2) the party 'relied on its adversary's conduct in such a manner as to change his position for the worse,' (3) the party's 'reliance was reasonable' and (4) the government 'engaged in affirmative misconduct.'" Honeywell at 114. Specifically, "[a]ffirmative misconduct means an affirmative act of misrepresentation or concealment of a material fact.... Mere negligence, delay, inaction, or failure to follow agency guidelines does not

[9] President Obama "Freedom of Information Act: Memorandum of January 21, 2009 for the Heads of Executive Departments and Agencies," 74 *Fed. Reg.* (Jan. 26, 2009), p. 1 (hereinafter "Obama FOIA Directive"), https://www.justice.gov/sites/default/files/ oip/legacy/2014/07/23/presidential-foia.pdf.

constitute affirmative misconduct." Board of County Comm'rs v. Isaac, 18 F.3d 1492, 1499 (10th Cir. 1994). All four factors are met here.

First, it is indisputable that Defendant made a series of "'definite' representations" to Plaintiff, over the span of several years. Defendant promised that, if Plaintiff paid $548, his request would be processed, and documents "**will be** released to you." Compl. ¶ 20 (emphasis added). Then, after waiting years before belatedly denying Plaintiff's request, Defendant granted his appeal, promising again and anew that EOUSA "**will send** [records] to you directly...." Compl. ¶ 29 (emphasis added). Defendant later again promised that Plaintiff's "request is currently being processed." Compl. ¶ 34.

Second, Plaintiff detrimentally relied on those representations. First, he paid the $548 fee required by Defendant. Compl. ¶ 21. Then, for nearly five years thereafter, Plaintiff expended significant time, effort, and attorneys' fees, attempting to follow-up with Defendant, and get Defendant to follow through on its end of the bargain. Now, Plaintiff has been forced to file suit to obtain Defendant's compliance with its agreement.[10]

Third, Plaintiff's reliance on Defendant's representations was entirely reasonable. Unlike other cases where plaintiffs were misinformed by low-level government employees, or those who were not qualified to give advice (*see, e.g.*, OPM v. Richmond at 418, 420), Defendant's representations to Plaintiff were made by authorized officials through official channels, after consultation with EOUSA's FOIA staff and "after carefully considering" his appeal. *See, e.g.*,

[10] The government's promise (which has yet to occur) to return Plaintiff's funds does not moot his claim, but rather confirms the government's breach of its agreement.

Compl ¶ 29, letter from Sean R. O'Neill — Chief, Administrative Appeals Staff at U.S. Department of Justice.

Fourth, Defendant has made a series of affirmative promises to Plaintiff that his request would be processed, beginning with the agreement to process Plaintiff's request upon receipt of $548. Compl. ¶ 20. Even after belatedly denying his request, Defendant affirmatively stated that "[i]f EOUSA locates releasable records, it will send them to you directly...." Compl. ¶ 29. Moreover, that promise was not made in ignorance of the EOUSA's position, but rather was made "as a result of discussion between EOUSA personnel and this Office...." *Id.* Later, Defendant "assure[d]" Plaintiff that his request "is currently being processed." Compl. ¶ 34. However, it now appears that Plaintiff's request was not processed — and perhaps even that Defendant never intended to process Plaintiff's request — despite Defendant's numerous affirmative statements to the contrary.

Surprisingly, with respect to the fourth prong of the Honeywell test, Defendant relies on Rogers v. IRS, 2015 U.S. Dist. LEXIS 24867, for the proposition that, since equitable estoppel did not apply in an Ohio case involving the same Plaintiff, it also must not apply here. In reality, the Ohio court found there to be no affirmative misconduct because "the IRS denied [Plaintiff's] request in its entirety and **affirmed the denial on administrative appeal** — **it did not mislead plaintiff** into believing that it would produce the requested documents." *Id.* at *17-18 (emphasis added). But in this case, exactly the opposite happened — Defendant **granted** Plaintiff's administrative appeal, and then for years **misled** him to believe it would produce documents. In other words, the type of affirmative misconduct evidence **lacking** in the Ohio case is precisely and exactly the type of misconduct **present** here. Interestingly, Defendant completely fails to

acknowledge these differences, instead asserting that facts of this care are "**similar**[]" to those in the Ohio case — later, Defendant remarkably goes one step further, claiming that "[t]here has been no subsequent activity" upon which Plaintiff can rely, and even asserting that the Sixth Circuit courts addressed "the **exact same** ... factual arguments"[11] as here. Def. Mot. at 9 (emphasis added). Defendant appears willfully ignorant of the facts of this case, conspicuously failing to recognize the fact that it granted Plaintiff's administrative appeal, and subsequently stonewalled him — repeatedly promising that it was processing his request, but in reality doing absolutely nothing. *See* Def. Mot. at 8 (emphasis added).

C. Conclusion.

In sum, although it may be true that equitable estoppel against the government should occur only in the rare case, this is such a case. For almost four years, Defendant's words and conduct have misled Plaintiff into believing that Defendant was searching for responsive records and that it would produce them in accordance with the FOIA. Defendant first misled Plaintiff by agreeing to process his request in exchange for payment, then changed course and claimed it was denying his request — only to later reverse course again and grant Plaintiff's appeal, again leading him on and repeatedly "assure" him that his request would be processed. The government has now done yet another about face, refusing to produce documents.

This repeated flip-flopping by Defendant led Plaintiff to expend significant funds over many years; yet it now would appear that Defendant may never have had any intention of

[11] Defendant claims that "the only difference here is that Plaintiff challenges EOUSA's response to the FOIA request rather than the IRS's response." Def. Mot. at 9. Of course the real distinction is not in the alphabet soup — EOUSA versus IRS — it is that EOUSA responded completely differently than did the IRS, agreeing to process in exchange for payment, granting his administrative appeal, and making repeated promises to produce documents.

processing his request. For years — and to Plaintiff's prejudice — Defendant has acted in a manner inconsistent with an intent to now claim reliance on the Settlement Agreement. In fact, Defendant expressly disclaimed reliance upon the Settlement Agreement of which it was fully aware, by granting Plaintiff's administrative appeal.

The application of equitable estoppel here will not frustrate any law or governmental purpose; rather, it will ensure a remedy for Defendant's inconsistent and unfair actions that now have lasted many years. Moreover, it will actually fulfill the purpose of the FOIA statute — "to inform citizens about what is known and done by their Government."[12]

IV. THERE IS A BINDING AND ENFORCEABLE CONTRACT BETWEEN THE PARTIES, ONE THAT SUPPLANTED THE 2012 STIPULATION AND SETTLEMENT AGREEMENT.

A. Defendant Entered into a Binding and Enforceable Agreement with Plaintiff.

Defendant asserts that Plaintiff's claims in this case "relate to" the 2012 Settlement Agreement, citing the court decision in Plaintiff's Ohio case against the IRS. Def. Mot. at 5-6. Thus, Defendant argues, Plaintiff's claims are barred by the terms of that agreement.

On the contrary, Plaintiff's complaint explained that his contract claims here arose not from the Defendant's mere failure to respond to his 2012 FOIA request, but subsequently: (i) in 2013, when Defendant promised to process Plaintiff's request in exchange for payment and was paid in full; (ii) in 2016, when Defendant granted Plaintiff's administrative appeal (agreeing with, or at least impliedly accepting, Plaintiff's argument that a contract existed); and (iii) when Defendant subsequently made "assur[ances]" that Plaintiff's request was being processed.

[12] *See* Obama FOIA Directive at 1.

Individually and collectively, these actions created an express (and written) binding agreement between the parties.

Should the 2012 Settlement Agreement be viewed as having any bearing on this suit, the parties' subsequent agreement should be viewed as a novation — one that **supplanted**, **superseded, waived, discharged,** and **extinguished** the Settlement Agreement. A Sixth Circuit decision clearly explains that "[i]t is a fundamental precept of contract law that parties may agree to discharge or terminate a contract in favor of creating a second agreement to replace the former, and, when that occurs, the initial agreement is superceded and is no longer enforceable as to any party thereto. ... Thus ... parties may substitute one contract for another, thereby discharging the pre-existing duty of the one party and extinguishing the other's right to enforce the original duty." Glazer v. Lehman Bros., 394 F.3d 444, 460 (6th Cir. 2005). That general rule applies here as well. *See* Biscayne Contrs., Inc. v. Redding, 219 F. Supp. 3d 41, 46 n.2 (D.D.C. 2016) ("'A novation discharges the original duty.'"). The effect of a novation is "essentially substituting a new contract for the old." Nashville Lodging Co. v. FDIC, 934 F. Supp. 449, 454 n.5 (D.D.C. 1996). This "make[s] the original agreement a nullity (that is, void and of no effect), and the rights of the new parties are governed solely by the new agreement." Eckart v. Brown, 34 Cal. App. 2d 182, 187 (Cal. 2nd Dist. Ct. App. 1939). As Plaintiff successfully argued to the Office of Information Policy during his administrative appeal, the former Settlement Agreement "had been **waived**, **supplanted**, **extinguished** and **replaced** by defendant's subsequent agreement to search for and produce records in exchange for payment." Complaint ¶ 28 (emphasis added), Exh. 13 at 4.

Even if this Court were to find that Defendant's 2013 promise to process Plaintiff's FOIA request in exchange for payment is insufficient to bind the parties by express contract, Defendant nevertheless should be bound on the theory that there is an implied-in-fact contract between the parties. Even in the absence of a traditional contract with express terms, courts can "infer" that a meeting of the minds took place, based on "other agreements implied from 'the promisor's words and conduct in the light of the surrounding circumstances.'" Perry v. Sindermann, 408 U.S. 593, 602 (1972). As such, a contract, "although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." Baltimore & O. R. Co. v. United States, 261 U.S. 592, 597 (1923).[13]

In this case, Defendant first granted Plaintiff's administrative appeal, and then made numerous and repeated promises to Plaintiff that it would search for and produce responsive records. Defendant asked that Plaintiff pay consideration in exchange for this promise, which Plaintiff paid in full. Defendant promised to produce documents both before and after it asserted the terms of the Settlement Agreement, even after Defendant belatedly — as an afterthought — denied Plaintiff's FOIA request.

Defendant now argues that EOUSA "did not envision" it was entering into an agreement to process Plaintiff's FOIA request when it demanded payment from Plaintiff in 2013. Def. Mot. at 13. Even if that somehow was true in 2013, it was not true in 2016. When Plaintiff appealed the administrative denial of his request in 2016, he expressly informed EOUSA that he believed a

[13] The Ninth Circuit has explained that "[i]mplied-in-fact contracts with the government have been enforced despite statutory or regulatory requirements that contracts be in writing." PacOrd, Inc. v. United States, 139 F.3d 1320, 1322 (9th Cir. 1998). In that case, the court noted that "the government made assurances to [the plaintiff] in order to secure the desired performance." *Id.* at 1323. Likewise, here, the government promised Plaintiff that if he paid a fee of $548, the government would process his FOIA request.

binding agreement existed between the parties. *See* Complaint Exhibit 13. By granting his administrative appeal, the government provided its "tacit understanding" of the agreement, and through that affirmative action either agreed (or at a minimum accepted) Plaintiff's position. Had the OIP desired to dispute Plaintiff's claim, it no doubt would have denied Plaintiff's administrative appeal and, as required by the FOIA, provided its legal reasoning for denying the merits of Plaintiff's claim. There is only one way to understand Defendant's grant of Plaintiff's administrative appeal — as providing additional confirmation and subsequent assurances that Defendant agreed to be bound by its end of the bargain.

B. Defendant's Arguments to the Contrary Are Unavailing.

Defendant puts forth several arguments in an attempt to avoid the finding of a binding agreement in this case. Each argument fails for different reasons.

1. Collateral Estoppel.

First, Defendant argues collateral estoppel — that Plaintiff's arguments previously were litigated in his Ohio case involving the IRS. Def. Mot. at 11. However, in the Ohio litigation, Plaintiff was not claiming rights under any express or implied contract such as is at issue in this case. Unlike the current case, at the time of the Ohio litigation, there was no written promise by the government (IRS) to produce records in exchange for payment (which was made), and thus no claim for breach of contract was asserted or litigated. Moreover, the Ohio case involved no agency grant of an administrative appeal, and there were no repeated subsequent "assur[ances]" that Plaintiff's request would be processed.

This clearly is an entirely different case than Plaintiff's Ohio case, with a different agency, different facts,[14] and thus different claims. Plaintiff is asking this Court to enforce a separate and distinct contract, made by a separate and distinct agency (EOUSA, not the IRS). The Ohio decision does not resolves the unique claims presented here. It is simply untrue, as Defendant argues, that "there can be no dispute that Plaintiff fully litigated these exact same issues of fact and law...." Def. Mot. at 11 n.2.

2. Specific Performance.

Second, Defendant argues that Plaintiff seeks the remedy of specific performance, and that this is a remedy he cannot obtain against the government. *See* Def. Mot. at 12. Defendant cites Yee v. Jewell, 228 F. Supp. 3d 48 (D.D.C. 2017) for the proposition that "[t]he *sole* remedy for an alleged breach of contract by the federal government is a claim for money damages, either in the United States Claims Court under the Tucker Act ... or, if damages of no more than $10,000 are sought, in district court under the Little Tucker Act...." *Id.* at 55, *citing* Sharp v. Weinberger, 798 F.2d 1521, 1523 (D.C. Cir. 1986).[15]

However, the government's carefully excised excerpt from Yee summarized not what the law **is**, but rather what the law **was**. The very next sentence in Yee, omitted from Defendant's

[14] Apparently, Defendant would prefer that those distinguishing facts were not present in this case. In neither its Statement of Material Facts nor its declaration does Defendant mention (or deny) the critical fact that the OIP granted Plaintiff's appeal and made repeated subsequent promises to produce documents. *See* Def. Mot. at 8; Def. Statement of Material Facts ¶ 14-15.

[15] Essentially, Defendant's argument is that district courts cannot hear a contract claim for specific performance, and the Court of Claims cannot provide that remedy, since that court "may neither grant declaratory ... nor injunctive relief." International Engineering Co., Div. of A-T-O, Inc. v. Richardson, 512 F.2d 573, 577 (D.C. Cir. 1975).

memorandum, states that "*Bowen v. Massachusetts*[16] arguably challenged this understanding." *Id.* Yee then explains that "[i]n the wake of *Bowen*, the D.C. Circuit ... recognized 'the strong case that ... the Tucker Act should **not** be read to "impliedly forbid" under the APA the bringing in district court of contract actions for specific relief.'" *Id.* at 56 (emphasis added), *citing* Transohio Sav. Bank v. Director, Office of Thrift Supervision, 967 F.2d 598, 612 (D.C. Cir. 1992).

Indeed, the D.C. Circuit has explicitly permitted breach of contract claims to vindicate other statutory or constitutional rights. For example, Megapulse, Inc. v. Lewis, 672 F.2d 959 (D.C. Cir. 1982), involved a contract between a defense contractor and the Coast Guard. Even though the contractor sued to keep the Coast Guard from releasing its proprietary data that had been created pursuant to a contract, the court instead recognized that the contractor was attempting to prevent a statutory violation of the Trade Secrets Act, even though "the data involved were originally provided to the government pursuant to the terms of various contracts...." *Id.* at 964. The court explained that "the mere fact that a court may have to rule on a contract issue does not, by triggering some mystical metamorphosis, automatically transform an action ... into one [based] on the contract and deprive the court of jurisdiction it might otherwise have." *Id.* at 968.[17]

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[16] 487 U.S. 879, 883 (1988). In Bowen, the Court noted that "[t]he policies of the APA take precedence over the purposes of the Tucker Act. In the conflict between two statutes, established principles of statutory construction mandate a broad construction of the APA and a narrow interpretation of the Tucker Act. The Court of Claims is a court of limited jurisdiction, because its jurisdiction is statutorily granted and it is to be strictly construed." *Id.* at 908 n. 46 (quoting Del. Div. of Health and Social Services v. Dept. of Health and Human Services, 665 F. Supp. 1104, 1117 (D. Del. 1987).

[17] The case that Defendant cites in support of its argument against specific performance is Associated Financial Corp. v. Kemp, 769 F. Supp. 398 (D.C. Cir. 1991). There, the Court started its analysis with the Megapulse rule, but then found that "[i]t is clear ... that the 'source of the rights asserted' by plaintiffs is the ... letter that 'committed' HUD to fund the Flexible Subsidy loan," and found that "[t]here is **no other source of rights**

A decade later, in Transohio, the D.C. Circuit found that the district court had jurisdiction to consider the claims of the plaintiff savings and loan banks, even though their claims were predicated upon the existence of a contract with the government. First, the court compared the facts of the case to those laid out in then-Judge Scalia's decision in Sharp, noting that:

> In structure, *Sharp* is much like the case before us. Plaintiffs in both assert that they **had contracts with the government**, contracts the government planned to **breach**. Plaintiffs in both assert that the contracts gave them a **property interest**, the denial of which ... is **inconsistent with federal law**. And plaintiffs in both **seek injunctive and declaratory relief**, not money damages. [*Id.* at 610 (emphasis added).]

The Transohio court then laid down the rule: plaintiffs "may bring statutory and constitutional claims for specific relief in federal district court ... even when the claims depend on the existence and terms of a contract with the government." *Id.* In other words, the court explained, "a federal district court may accept jurisdiction over a statutory or constitutional claim for injunctive relief even where the relief sought is an order forcing the government to obey the terms of a contract - that is, specific performance." *Id.* Finally, the court explained that "federal district courts [are not] forbidden from granting injunctive relief merely because that relief might be the equivalent of ordering specific performance of a government contract...." *Id.* at 611.

To be sure, Plaintiff's Complaint relies in part on the existence of his contract with the government, and uses the term "specific performance." Compl. ¶¶ 49-54. However, the

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asserted by plaintiffs. **Neither the statute nor the regulations require** HUD to approve a Flexible Subsidy loan application if it meets certain criteria." *Id.* at 402-03 (emphasis added). A very different circumstance exists here, however, as the FOIA is the source of rights on which Plaintiff relies, and the FOIA certainly requires Defendant to process FOIA requests.

remedies Plaintiff seeks are statutory remedies — the same as any plaintiff would seek in any FOIA case. Compl., Prayer for Relief 1-4.[18]

Plaintiff's argument is clear: even if the Settlement Agreement once applied to Plaintiff's ability to file a FOIA request and obtain documents, the government's subsequent contract, subsequent grant of the administrative appeal, and subsequent repeated promises to produce documents restored that ability by supplanting the terms of the Settlement Agreement. Thus, at its core, Plaintiff's complaint includes a FOIA claim, even though that claim, like in Transohio, "depend[s] on the existence and terms of a contract with the government." Although Plaintiff's agreement with the government (wherein the government agreed to be bound by the FOIA) may be the source of his ability to submit a FOIA request, the FOIA is the statute that gives Plaintiff his rights, and thus provides the source of the relief Plaintiff seeks. Plaintiff's contract with the government requires Defendant to comply with the FOIA; in turn, the FOIA requires Defendant to process Plaintiff's request — the remedy Plaintiff seeks. As in Megapulse, "the mere fact that [this Court] may have to rule on a contract issue does not, by triggering some mystical metamorphosis," transform this into a contract case. Megapulse at 968. While the remedy Plaintiff seeks "might be the equivalent of ordering specific performance of a government contract," it nevertheless constitutes a statutory remedy under the FOIA — one that this Court clearly has the jurisdiction to order. Transohio at 611.

[18] Alternatively, Plaintiff would argue that the contract law remedy of specific performance is the appropriate remedy when the subject matter of the contract is unique, and other legal remedies are deemed to be either inadequate or impracticable. In the case at bar, the records sought by Plaintiff are unique. Therefore specific performance is the appropriate remedy — not restitution in the form of a belated refund. Plaintiff has uncovered no case involving a FOIA challenge that seeks specific performance. Plaintiff has uncovered no legal or policy argument against a court ordering the government to process a FOIA request, and Defendant has not made one.

3. Mootness.

Third, Defendant claims that Plaintiff's claims are moot, because Defendant has "begun processing the return of his payment."[19] Def. Mot. at 12. Refunding Plaintiff's money does not help Defendant's case. In any event, no such refund has been received as of this filing. Of course, Plaintiff does not seek rescission and restitution. He seeks to have the government follow through on the terms of its bargain — exactly what the FOIA requires the government do anyway. As explained in the paragraphs above, Plaintiff is seeking a statutory FOIA remedy, not a pure contract remedy. Defendant cannot force Plaintiff to accept a contract remedy (restitution) for a statutory remedy (production of documents under the FOIA), especially when that statutory remedy and waiver of sovereign immunity undergirding FOIA is premised on the idea that money damages at law is an insufficient remedy.

4. No Intent to Contract.

Fourth and finally, Defendant argues that "EOUSA did not understand its request that Plaintiff pay the processing fee to create a contractual relationship." Def. Mot. at 12. Defendant confidently asserts that "there can be no debate" about this. *Id.* Apparently, it is Defendant's belief that it was permitted to demand $548 in exchange for processing Plaintiff's request, accept and deposit Plaintiff's check, and then do nothing. However, Defendant's own regulations provide the opposite — that DOJ "may require that the requester make an advance payment up to the amount of the entire anticipated fee **before beginning to process** the request." 28 C.F.R.

[19] It would appear that the FOIA statute requires the return of search fees, even if the government still must process the request. *See* 5 U.S.C. § 552(a)(4)(A)(viii)(II)(aa) ("If the agency fails to comply with the extended time limit, the agency may not assess any search fees...."); *see also* 28 C.F.R. § 16.10(d)(2) ("If a component fails to comply with the FOIA's time limits in which to respond to a request, it may not charge search fees....").

§ 16.10(i)(2) (emphasis added). It simply defies common sense that a FOIA requester would pay the search fees demanded by an agency, and then have no right to expect anything in return.

However, even if Defendant could persuade this Court that there was no "meeting of the minds" in the initial request for payment of fees in exchange for processing a request, Defendant's subsequent actions tell a different story. In Plaintiff's October 2016 appeal letter, Plaintiff argued that:

> the U.S. Department of Justice (EOUSA) entered into an agreement to produce the responsive records and that [Plaintiff] paid $548.00 as consideration for the promise to search for and copy the records. Therefore, that agreement is enforceable, and it supersedes and supplants the August 1, 2012 Stipulation and Settlement Agreement upon which ... EOUSA relies in its denial letter.... [Complaint Exhibit 13 at 1-2.]

In response, the OIP's December 2016 letter specifically stated that "[a]fter carefully considering your appeal, and as a result of discussions between EOUSA personnel and this Office, I am remanding your client's request to EOUSA for a search for responsive records. If EOUSA locates releaseable records, **it will send them to you directly**." Complaint Exhibit 14 (emphasis added).

Thus, Defendant's letter granting Plaintiff's appeal clearly acknowledged that there was an agreement between the parties, and promised that Defendant would hold up its end of the bargain. Thereafter, in response to requests by Plaintiff, Defendant sent at least two additional letters to Plaintiff, providing subsequent written assurances, and promising that Defendant would follow through on its agreement. Compl. ¶¶ 32, 34. *See* U.C.C. § 2-609, Right to Adequate Assurance of Performance. As Defendant describes it, a contract "is a promise or set of promises...." Def. Mot. at 13.

Truly, "there can be no debate" that, at the point at which the OIG **granted** Plaintiff's administrative appeal, Defendant **fully understood** Plaintiff's position that there was a binding agreement between the parties, **concurred** that the agreement should be enforced, and **promised** that Defendant would hold up its end of the bargain.

C. Conclusion.

In 2013, Defendant promised that, if Plaintiff paid $548, a "search" would occur and "documents ***will be*** released to you." Compl. ¶ 20 (emphasis added). Plaintiff held up his end of the bargain, quickly paying the $548. Compl. ¶ 21. In 2016, the OIP promised that "[i]f EOUSA locates releaseable records, **it will send** them to you directly...." Compl. ¶ 29. In March of 2017, Defendant assured Plaintiff that "EOUSA **is now in the process** of locating releaseable records, which it **will send**...." Compl. ¶ 31 (emphasis added). And in June of 2017, Defendant wrote that EOUSA "can **assure** you that [Plaintiff's] request **is** currently **being processed**." Compl. ¶ 34 (emphasis added). Plaintiff does not know if all of these promises and representations by Defendant were untrue when made, or if, perhaps, EOUSA in fact processed his request, but found responsive records that would be embarrassing for the government to produce. In any event, Defendant has not sent Plaintiff any records. The only thing Defendant **has** done is force Plaintiff to endure endless and impenetrable government bureaucracy (including the charade of what the government apparently views as a meaningless administrative appeal process) that has now delayed matters the better part of a decade.

For the reasons set out above, the government's repeated promises to Plaintiff constitute a binding agreement that this Court has the power to enforce.

V. DEFENDANT'S REFUSAL TO COMPLY WITH ITS OWN GRANT OF PLAINTIFF'S ADMINISTRATIVE APPEAL VIOLATES THE OIP'S REMAND ORDER, DEFENDANT'S OWN REGULATIONS, AND THWARTS THE PURPOSE OF THE FOIA.

More than three years after initially agreeing to process Plaintiff's FOIA request upon receipt of payment, EOUSA changed positions and belatedly denied Plaintiff's request in September of 2016, based on language in the August 2012 Settlement Agreement. Compl. ¶ 20, 27. Thereafter, the Department of Justice again reversed positions, and granted Plaintiff's administrative appeal in December of 2016, evidencing agreement with Plaintiff that the terms of the Settlement Agreement had been supplanted by EOUSA's subsequent agreement to process documents in exchange for payment. Compl. ¶ 29. Nevertheless, in a third flip-flop, EOUSA has since failed to process Plaintiff's request and, in its Motion, denies any obligation to do so — in direct contravention of the agency's own decision to grant Plaintiff's appeal, in violation of its own regulations and procedures, and in violation of the FOIA.

An administrative appeal is not an elective process which the agency may or may not choose to follow. Rather, it is a process detailed in and required by statute. 5 U.S.C. § 552(a)(6)(A) protects "the right of [a requester] to appeal to the head of the agency," mandating that an agency must "make a determination with respect to any appeal...." If the appeal is denied, the statute requires the agency to specify the legal reasons for that denial. The statute is silent as to exactly what happens if an appeal is granted, however common sense dictates that the agency's decision at the administrative appeal stage has the force of law, and that Congress contemplated that the agency would process the request and produce non-exempt records.

Consistent with that common sense view, Defendant's FOIA regulations are crystal clear, as they specifically mandate that "[i]f a component's decision is **remanded** or modified on appeal, the requester will be notified of that determination in writing. The component [FOIA office] **will thereafter further process the request in accordance with that appeal determination** and respond directly to the requester." 28 C.F.R. § 16.8(c) (emphasis added). It is "axiomatic" in this Circuit that "an agency is bound by its own regulations."[20] Nat'l Envtl. Dev. Ass'ns Clean Air Project v. EPA, 752 F.3d 999, 1009 (D.C. Cir. 2014). Having granted Plaintiff's appeal, the 2012 Settlement Agreement ceased to be available as an excuse for noncompliance, as Defendant's own regulations require compliance.

Defendant admits that, after Plaintiff's appeal was granted and, in accordance with DOJ regulations, the Office of Information Policy "remanded the request back to EOUSA for processing." Def. Mot. at 3. In this case, however, Defendant then failed to process Plaintiff's request "in accordance" with OIP's grant of the appeal. Indeed, Defendant appears to have failed to process Plaintiff's request at all — and Defendant still steadfastly refuses to do so. To permit Defendant to ignore its own decision to grant Plaintiff's administrative appeal — in essence treating the agency's ruling a nullity, and its compliance as optional or voluntary — would turn that statutory process into a sham, a fraud.[21] Congress did not intend the administrative appeals

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[20] An agency is bound even from reaching **different results** in **different cases** "unless it has provided a reasoned explanation for its departure...." ACLU v. United States Department of Justice, 321 F. Supp. 2d 24, 33 n.13 (D.D.C. 2004). In this case, however, Defendant seeks to arrive at a **different result** than it previously chose **in this very same case** — and certainly has not provided any type of explanation for its actions, to say nothing of a "reasoned explanation" for its repeated flip-flops of position.

[21] The FOIA administrative appeals process is not a sham, and no court has treated it as such. For example, some courts even limit an agency to reliance only on those legal arguments offered by the agency during the administrative appeal process. *See* Friends of the Coast Fork v. United States Department of the Interior, 110 F.3d 53, 55 (9th Cir. 1997).

process to be meaningless or, even worse, be used to render meaningless decisions, allowing an agency to frustrate the ability of FOIA requesters to obtain government records. Sanctioning Defendant's actions in this case would turn the administrative appeal into little more than a empty exercise in bureaucratic paper shuffling, which serves only one objective — to allow an agency to delay further resolution of a FOIA request[22] — as has occurred in this case.

Defendant's refusal to honor the ruling of its own appellate process not only violates the clear language of its own regulations and violate the OIP's remand order, but also it frustrates the Congressionally mandated FOIA appeals process. This Court should not allow the agency to make a mockery of the administrative appeal process, by disregarding the OIP ruling on Plaintiff's appeal, ignoring the statute, and violating its own regulations.

SUMMARY & CONCLUSION

For the better part of a decade, the EOUSA has grossly mishandled Plaintiff's FOIA request. First, in early 2013, it agreed to process Plaintiff's FOIA request in exchange for a sum of money that Plaintiff immediately paid. However, operating like a fly-by-night contractor who promises to do a job once he gets the money up front, EOUSA deposited Plaintiff's check, and then did absolutely nothing for the next 40 months — neither sending Plaintiff documents, nor providing any explanation or justification for its delay, and even refusing to respond to repeated requests for an update.

Belatedly — almost as an afterthought — the EOUSA in late 2016 then claimed it was officially denying Plaintiff's request, relying on the 2012 Settlement Agreement, and claiming

[22] Requiring administrative appeals to be meaningful also is important in light of the general rule that all administrative remedies must be exhausted before suit is filed.

Plaintiff had no right to file his FOIA request. EOUSA provided no reason for why it had changed its position, and offered Plaintiff no refund of the money he had paid.

Then, the OIP (after consultation with EOUSA) reversed course, and granted Plaintiff's administrative appeal, agreeing with Plaintiff (or at least accepting his premise) that the parties had entered an agreement whereby EOUSA would process Plaintiff's request. The grant of appeal promised that documents would be forthcoming. However, apparently not satisfied with the result reached by its own appeals process, EOUSA through counsel now refuses to comply with the remand order from within its own agency, and remarkably again claims reliance on the 2012 Settlement Agreement it previously waived.

Plaintiff seeks relief from this Court, to put an end to EOUSA's tactics, and to compel EOUSA finally to process his request and provide records. EOUSA's continual flip-flopping has cost Plaintiff and his counsel considerable time, money, and aggravation over many years. No component of the federal government should be permitted to act as EOUSA has acted in this case.

More recently, in its motion asking this Court to dismiss Plaintiff's claims, Defendant failed to apprise this Court of Price v. United States, a recent case from this Circuit that refused to enforce the type of waiver Defendant seeks to enforce against Plaintiff here. Later, Defendant's motion misstates the holding of Yee v. Jewel, fails to apprise the Court of the current state of the law, and wrongly argues that Plaintiff's claims must be dismissed because they involve contract law and seek a remedy that mirrors specific performance. Finally, Defendant repeatedly (and highly conspicuously) overlooks critical facts, failing to report (much less address) the reality that the OIP granted Plaintiff's administrative appeal and promised that

EOUSA would process his request. As a result, Defendant's motion inexplicably claims that both the facts and the law here are the same as in a prior case in another circuit, ignoring that Plaintiff raises different claims, based on different facts, against a different agency,[23] relying on different legal principles.

There is no legal or policy justification for Defendant's refusal to process Plaintiff's FOIA request. In fact, EOUSA has provided no reason at all for its actions. Plaintiff asks this Court to restore order by denying Defendant's motion to dismiss and for summary judgment, and to grant summary judgment to Plaintiff.

Respectfully submitted,

/s/ Robert J. Olson

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July 13, 2018

[23] In its Statement of Material Facts (ECF #6-2), Defendant notes that "Plaintiff entered into a [settlement] agreement with the IRS on August 1, 2012."

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JON R. ROGERS Plaintiff, v. EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS Defendant.	)	Civil Action No. 18-454 (RBW)

PLAINTIFF'S STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO GENUINE DISPUTE

There are no disputed facts at issue herein. Plaintiff does not dispute any of the facts contained in Defendant's Statement of Material Facts as to Which There Is No Genuine Dispute. However, Defendant's Statement omits certain material facts, which should also be undisputed. Thus, Plaintiff offers the following, more complete, statement of undisputed facts, as follows:

1. In the 1990's and 2000's, Plaintiff was the target of at least two federal criminal investigations. Compl. ¶ 6; Def. Mot. at 1.

2. Plaintiff was never charged with any crime. Compl. ¶ 7; Def. Mot. at 1.

3. In August of 2012, Plaintiff entered into a Settlement Agreement with the IRS, in order to obtain the return of a large sum of assets that the government had seized and refused to return. Compl. ¶¶ 9-10; Def. Mot. at 2-3

4. Plaintiff filed a FOIA request in November of 2012 seeking records related to the government's investigations into his activities, which Defendant admits it received. Compl. ¶¶ 17-18; Def. Mot. at 2; Def. Facts ¶¶ 4-5, 11.

5. In April of 2013, Defendant required payment of $548 from Plaintiff (which Plaintiff paid), upon receipt of which Defendant stated that "documents will be released to you." Compl. ¶¶ 20-21; Def. Mot. at 3; Def. Facts ¶ 11.

6. From April 2013 to October 2016, Defendant failed to respond to Plaintiff's repeated requests for an update. Compl. ¶¶ 21-26.

7. In September 2016, Defendant denied Plaintiff's FOIA request, relying on the terms of the 2012 Settlement Agreement. Compl. ¶ 27; Exh. 13; Def. Mot. at 3.

8. In December of 2016, Defendant granted Plaintiff's administrative appeal, and promised that "it will send" Plaintiff documents. Compl. ¶ 29; Exh. 14; Def. Mot. at 3.

9. Defendant then made subsequent assurances that it would produce documents. Compl. ¶¶ 31-32, 34; Exhs. 16-17, 19.[1]

10. After more than five years, Defendant has failed to respond to Plaintiff's request, and Defendant has not produced a single document to Plaintiff, or given any indication that it has processed Plaintiff's request in any way. Compl. ¶ 35; Exhs. 1, 19.

Dated: July 13, 2018

Respectfully submitted,

/s/ Robert J. Olson

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[1] In its statement of facts and in its declaration, Defendant fails to acknowledge the facts contained in paragraphs 8 and 9 above.

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