

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

K. DENISE RUCKER KREPP,

Plaintiff,

VS.

UNITED STATES DEPARTMENT OF
JUSTICE,

Defendant.

CIVIL ACTION NO. 16-0926 (KBJ)

ORAL HEARING REQUESTED

PLAINTIFF'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Plaintiff K. Denise Rucker Krepp, by and through undersigned counsel, respectfully opposes Defendant United States Department of Justice's Motion for Summary Judgment (Dkt. 11). In support of this Opposition, Plaintiff submits the following: her Memorandum in Support of Plaintiff's Opposition to Motion for Summary Judgment, Plaintiff's Response to Defendant's Statement of Material Facts Not in Genuine Dispute, Declaration of K. Denise Rucker Krepp, and a Proposed Order Denying Motion for Summary Judgment.

Dated: August 17, 2016

Respectfully submitted,

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I. INTRODUCTION

At its core, this matter is about whether a government agency can apply one standard when interpreting a Freedom of Information Act (“FOIA”) request from a private citizen, and a completely different standard when the *same* information is requested by a powerful United States Senator. According to applicable law and the intent of FOIA, the answer is a resounding *No*. However, Defendant Department of Justice (“DOJ”) believes otherwise, having brought the present Motion for Summary Judgment (“Motion”) before this Court despite having already produced the responsive records in response to a letter from Senator Charles Grassley that sought the records requested by Plaintiff K. Denise Rucker Krepp (“Plaintiff” or “Ms. Krepp”) in this case.

The Motion argues for the application of a strict (and incorrect) legal standard for evaluating FOIA requests by ordinary citizens such as Plaintiff. At the same time—and without disclosing it to this Court—DOJ used an entirely different disclosure standard when responding to a FOIA request by Senator Charles Grassley that sought the *exact same records*. Seeing as Senator Grassley chairs the committee responsible for confirming the nomination of the acting U.S. Attorney for the District of Columbia, it is hard to avoid the conclusion that DOJ gives ordinary citizens who seek data through FOIA the runaround, but happily provides the same information to well-connected individuals in the hope of receiving political favors.¹ This double standard is contrary to the spirit and purpose of FOIA.

For these reasons, and the reasons set forth in more detail below, this Court should reject DOJ’s position and deny its Motion for Summary Judgment.

¹ Indeed, as set forth below, the letter providing the records makes express reference to the pending nomination.

II. BACKGROUND

Ms. Krepp filed the instant action after lengthy and frustrating correspondence with the United States Attorney's Office for the District of Columbia ("USAO-DC"). As this Court is aware, Washington, D.C. ("DC") is in an unusual situation with respect to criminal enforcement. There is no local DC police force. DC residents are dependent on the USAO-DC to conduct criminal prosecutions of ordinary crimes, not just violations of the United States Criminal Code. Complaint (Dkt. 1) ¶¶ 21-25. After witnessing a spike in violent crime in her neighborhood, and what she and her neighbors believed was unwillingness by the USAO-DC to consistently bring charges against individuals arrested for those crimes, Ms. Krepp asked the USAO-DC for data regarding its prosecution rates in the District of Columbia. *Id.* at ¶¶ 29-40. After USAO-DC repeatedly rebuffed her informal requests, Ms. Krepp filed a formal FOIA request with DOJ, the agency that oversees USAO-DC on November 5, 2015. *Id.* at ¶¶ 22-23, 41-43; *see also* Complaint Exhibit 1. The request sought statistics regarding DOJ's review and prosecution of criminal homicide, rape, robbery, aggravated assault, burglary, larceny, motor vehicle theft, and arson. *Id.* at ¶ 43; Complaint Exhibit 1. DOJ denied Ms. Krepp's request, stating that it had no "responsive records regarding" the FOIA request. *Id.* at ¶ 51; *see also* Complaint Exhibit 2. Ms. Krepp appealed, and DOJ reiterated its position that the data requested did not exist. However, DOJ suggested in its appeal denial that although the USAO-DC did not track the information Ms. Krepp requested by District of Columbia ward, it may maintain such data organized by police service area and/or police district. *Id.* ¶¶ 52-56; *see also* Complaint Exhibit 4. Rather than simply provide the data organized by police service area or police district, DOJ suggested that Ms. Krepp submit a *new* FOIA request for that data. *Id.* Since Ms. Krepp had exhausted her administrative remedies at this point, she filed the instant action, requesting that this Court require DOJ to turn over the data she had requested.

On May 25 and June 15, 2016, Senator Charles Grassley's office wrote letters to DOJ "requesting information on, among other things, an ongoing Freedom of Information Act ('FOIA') case related to certain prosecutions data in the District of Columbia, Krepp v. United States, No. 16-cv-00926-KBJ (D.D.C)." Letter from Peter J. Kadzik, Assistant Attorney General, to The Honorable Charles E. Grassley (July 15, 2016) (the "July 15 Letter"), attached hereto as Exhibit 1. On July 15, 2016, DOJ provided the criminal records Ms. Krepp had originally sought six months earlier to Senator Grassley's office, noting: "[W]e are pleased to enclose the requested information sorted by the seven police districts used by the Metropolitan Police Department." *See* Exhibit 1.

At the same time DOJ was working cooperatively to provide criminal prosecution records to Senator Grassley, it was simultaneously refusing to provide the exact same records to Ms. Krepp. On June 29, 2016, Plaintiff and Defendant submitted a Consent Motion for Enlargement of Time (Dkt. 9), which requested the Court's approval for DOJ to submit a response to Ms. Krepp's Complaint thirty days later than would otherwise be permitted under the rules. The Court granted this Motion on June 30, 2016, which meant that DOJ had until August 4, 2016 to file a response. Minute Order Granting in Part and Denying in Part Motion for Enlargement of Time (June 30, 2016).² During the extended period DOJ used to prepare its Motion, it was simultaneously working to provide the records to a preferred customer—Senator Grassley.

On August 4, 2016, despite having agreed to provide the data sought by Ms. Krepp's FOIA request to a United States Senator (but not to Ms. Krepp herself), DOJ filed a Motion for Summary Judgment, seeking dismissal of Ms. Krepp's lawsuit and maintaining that it had no data in response to Ms. Krepp's request. Defendant's Motion for Summary Judgment (Dkt. 11).

² The Minute Order denied the Motion in part because it included a request by Ms. Krepp for an extension of her anticipated filing deadline; per the Order, this Court denied that aspect of the Motion because DOJ had not filed a response yet and thus there was no deadline ripe for addressing. *Id.*

Surprisingly, the Motion makes no mention of the correspondence with Senator Grassley's office regarding this case or DOJ's provision to Senator Grassley of the records responsive to Ms. Krepp's FOIA request.

III. ARGUMENT

A. Summary Judgment Standard.

Summary judgment provides a way for litigants to avoid the fact-finding function of federal courts. It is only "granted when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. In determining whether a genuine issue of fact exists, the court must view all facts in the light most favorable to the non-moving party." *Judicial Watch, Inc. v. Consumer Financial Protection Bureau*, 985 F. Supp. 2d 1, 6 (D.D.C. 2013) (citations omitted). This is true even in a FOIA case, as "[u]nder FOIA, all underlying facts and inferences are analyzed in the light most favorable to the FOIA requester." *Id.* (citations omitted); *see also Willis v. DOJ*, 581 F. Supp. 2d 57, 65 (D.D.C. 2008) (same).

A District Court reviewing a Motion for Summary Judgment in a FOIA case conducts a *de novo* review of the record, and the responding agency has the burden of proving that it has complied with its obligations under FOIA. *In Defense of Animals v. Nat'l Insts. Of Health*, 543 F. Supp. 2d 83, 92-93 (D.D.C. 1996) (citing *Assassination Archives & Research Ctr. v. Cent. Intelligence Agency*, 334 F.3d 55, 57 (D.C. Cir. 2003)). If an agency demonstrates that its search was reasonable, the burden shifts to the requesting party to demonstrate that the search was not conducted in good faith. *Moore v. Aspin*, 916 F. Supp. 32, 35 (D.D.C. 1996) (citing *Miller v. U.S. Dep't of State*, 779 F.2d 1378, 1382 (8th Cir. 1985)). If a review of the factual record raises substantial doubt, particularly in view of "well-defined requests and positive indications of overlooked materials," summary judgment is inappropriate. *Founding Church of Scientology v. National Sec. Agency*, 610 F.2d 824, 837 (D.C. Cir. 1979). "[O]nly after an agency proves that it

has fully discharged its FOIA obligations is summary judgment appropriate.” *Judicial Watch*, 985 F. Supp. 2d at 6 (citations omitted). For the reasons discussed in this Memorandum, DOJ has *not* fully discharged its FOIA obligations, and thus its Motion for Summary Judgment should be denied.

B. DOJ’s Narrow Reading of Ms. Krepp’s FOIA Request Is Contrary to FOIA’s Spirit and Case Law Interpreting FOIA.

The crux of DOJ’s argument is that because it does not maintain the data requested by Ms. Krepp in the *precise* format in which she requested it (by District of Columbia ward, rather than police service area or police district), this is sufficient grounds for complete denial of her FOIA request on the basis that no such records exist. Memorandum of Points and Authorities in Support of Defendant’s Motion for Summary Judgment (Dkt. 11) (the “MSJ Memo”) at 6-14. The three Declarations submitted in support of DOJ’s Motion are used to support this point. Decl. of Tricia Francis (Dkt. 11-1); Decl. of Petula Coon (Dkt. 11-2); Decl. of Theresa D. Jones (Dkt. 11-3). However, DOJ barely addresses the *actual* legal issue presented here: whether it is permitted under the law to reject a FOIA request when it has the data in its possession, but not in the exact format in which is it requested. The case law interpreting FOIA strongly disfavors such a narrow reading and imposes an obligation on DOJ to produce the data it does have, and in the format in which it is kept (in this case, by police service area or police district). DOJ’s narrow reading of FOIA is especially inappropriate—and the public’s need for federal government data is especially critical—in the current environment, where District of Columbia residents’ public safety is dependent on DOJ and USAO-DC for the prosecution of criminals. Complaint at ¶¶ 21-25. Residents cannot simply vote to replace the head criminal prosecutor for the District of Columbia (or the local elected official who appointed him or her) if they felt that

the prosecutor was not performing his or her duties, as they would in any state in the U.S. *Id.* at ¶¶ 24-25.

1. The Single Case Cited by DOJ in Support of Its Narrow Interpretation Is Inapplicable.

The one case DOJ cites to support its stance that it need not provide data in a different format than requested—*Wilson v. U.S. Department of Transportation*—is easily distinguishable from the facts here. *Wilson v. U.S. Dep’t of Transportation*, 730 F. Supp. 2d 140, 152 (D.D.C. 2010). As DOJ summarizes in its MSJ Memo, the court in *Wilson* stated that the employee comments and survey results sought (those from a particular office within the agency) were kept in a larger collection of *all* survey results and could not be culled out from the larger collection because they did not identify the originating office. *Id.* at 152.

Ms. Krepp’s request that the data be sorted by ward is not comparable to the request in *Wilson* for data specific to a particular office. In *Wilson*, the primary request was for survey results and comments from a particular office, and the responding agency had no way of providing that data because it was part of a much larger set of data with no way to filter it to the results sought. Here, Ms. Krepp is seeking prosecutorial data relating to particular crimes and dates, which DOJ admits it has in its database, and the format requested (sorted by ward) is secondary to the request, because the FOIA request makes clear that she seeks data for the entire District of Columbia. The data DOJ admits it has, which is sorted instead by police service area and/or police district instead of ward, would have sufficed to fulfill Ms. Krepp’s request *and* would have met the legal standards for the interpretation of FOIA requests. Instead of simply providing this data, DOJ decided to continue stonewalling Ms. Krepp.

2. DOJ Is Obligated Under FOIA and Its Own Policies to Interpret a FOIA Request Broadly.

The law in this Circuit regarding an agency's obligations under FOIA embraces the congressional purpose of open government. *Campbell v. United States Dep't of Justice*, 164 F.3d 20, 27 (D.C. Cir. 1998). "While recognizing that the number of requests for information may pose burdens on agencies, Congress determined its ultimate policy of open government should take precedence." *Valencia-Lucena v. United States Coast Guard, FOIA/PA Records Mgmt.*, 180 F.3d 321, 325 (D.C. Cir. 1999). The fundamental principle animating FOIA is public access to government documents. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 151 (1989). "[FOIA] seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *Id.* "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

An agency has a duty to construe a FOIA request liberally. *LaCedra v. Exec. Office for United States Attys.*, 317 F.3d 345, 348 (D.C. Cir. 2003) ("the Government's obligation under the law of this circuit [is] 'to construe a FOIA request liberally'"); *Nation Magazine, Washington Bureau v. United States Customs Service*, 71 F.3d 885, 890 (1995) ("Although a requester must 'reasonably describe the records sought, an agency also has a duty to construe a FOIA request liberally'"); *Truitt v. Dep't of State*, 897 F.2d 540, 544-45 (D.C. Cir. 1990) (citing Senate Report accompanying relevant provision of FOIA, which stated that "the identification standard in the FOIA should not be used to obstruct public access to agency records," and that a liberal standard

for identification should be used); *Founding Church of Scientology of Washington, D.C., Inc. v. National Sec. Agency*, 610 F.2d 824, 836-37 (D.C. Cir. 1979) (same).

DOJ's own internal guidance for responding to FOIA requests reiterates that "an agency should carefully consider the nature of each request and give a reasonable interpretation to its terms and overall content." United States Dep't of Justice, *Guide to the Freedom of Information Act, Procedural Requirements*, at 25 (2013), <http://www.justice.gov/oip/foia-guide.html>. And recent guidance from the President of the United States makes clear that agencies responding to FOIA requests should do so in the spirit of cooperation, recognizing that they serve the citizens to which they are responding. *See generally* Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009) (directing agencies to respond to FOIA requests "in a spirit of cooperation").

Given the broad interpretation requirement applied by the courts (and DOJ's own guidance), DOJ cannot support its stance that Ms. Krepp's FOIA request (which clearly stated that she was seeking prosecutorial data for certain crimes over a certain period of time) should be rejected simply because of the format in which the data was requested. To the contrary, DOJ should have provided Ms. Krepp with the data in the way that it *is* stored—in this case, by police service area or police district. *See* Complaint Exhibit 4 at 1 ("Please be advised that police service areas, also known as the districts, are used for reporting purposes."); Decl. of Petula Coon (Dkt. 11-2) at ¶¶ 9, 12 ("Within RCIS, data regarding arrests for types of crime is collected and organized by District of Columbia Police District and Police Service Area ('PSA') in which the crime occurs. ... My review confirmed that case information pertaining to arrests handled by the USAO-DC, is maintained according to the Police District and Police Service area in which a crime is committed ..."). Ms. Krepp should not be required to file a new FOIA request simply to

change the *format* in which the data is requested. Indeed, DOJ did not ask Senator Grassley to submit a new request—it provided him with the information it had. That is the reasonable thing to do, and it should be done for ordinary citizens seeking information through FOIA, not just powerful senators.

3. Cases Addressing Requests Comparable to Ms. Krepp’s Have Required Broader Interpretations of FOIA Requests Than What DOJ Suggests Here.

A comparable case can be found in *Edelman v. SEC*, where a requester sought records of internal Securities and Exchange Commission (“SEC”) notes and interviews made or conducted in response to certain consumer complaints. 2016 U.S. Dist. LEXIS 38187, at *8 (D.D.C Mar. 24, 2016). The plaintiff there argued that the SEC erred in construing his request to only be for documents created in response to the consumer complaints, not the complaints themselves. *Id.* at *49-50. The SEC argued that it was under no obligation to produce the complaints because the request did not explicitly seek complaints, and only sought records regarding the SEC’s response to the complaints. *Id.* at *52. The court acknowledged that the SEC’s interpretation was “not far-fetched,” but ultimately ruled that the more natural “liberal” reading of the request was to interpret it to include the actual complaints themselves, if only to contextualize the SEC’s response. *Id.* at *52-53.

Another comparable case is *Nation Magazine*, 71 F.3d at 885. There, appellant Nation Magazine requested records from the Customs Service regarding offers from H. Ross Perot to aid the Customs Service in drug interdiction efforts. *Id.* at 887. Specifically, the request sought access to “U.S. Customs Service records and documents indexed or cross-indexed under the name H. Ross Perot that were created any time between January 1969 and November 1992.” (emphasis added). *Id.* at 888. The requesting letter explained that the request sought “all records and documents pertaining to Mr. Perot maintained for or by the Washington, DC headquarters of

the Customs Service; and ... the Miami, Florida, and Houston, Texas offices,” as well as information “pertaining to any person identified during the years 1969 and 1992 as an employee, consultant, or advisor to Mr. Perot.” *Id.*

In response, the Customs Service told Nation Magazine that its search had revealed no responsive records in its non-investigatory files (it also issued a “Glomar Response,” stating that it could neither confirm nor deny the existence of responsive investigatory records). *Id.* Nation Magazine filed suit, but the District Court granted summary judgment in favor of the Customs Service, holding that the agency’s search for responsive records was adequate. *Id.* at 889. On appeal, the appellate court reviewed the adequacy of the Customs Service’s search *de novo*, which first required ascertaining the scope of Nation Magazine’s request. *Id.* at 889-90. The Customs Service had limited its search to records accessible by a name or personal identifier, and argued that the search was adequate because Nation Magazine only asked for records “indexed and cross-indexed to Perot’s name.” *Id.* Nation Magazine argued that its request was broader. *Id.* at 890.

The appellate court sided with Nation Magazine, noting that while a requester under FOIA must “reasonably describe” the records sought, an agency also has a duty to construe a FOIA request liberally. *Id.* The court explained that while the request did seek records under Perot’s name, it also explicitly sought information “pertaining to” Perot and information regarding offers of assistance from Perot. *Id.* The court stated that the inclusion of the words “pertaining to” coupled with a request for a memo that did not include Perot’s name “were sufficient to alert the agency that appellants sought information about Perot, even if it was not indexed to his name.” *Id.*

Similarly, here Ms. Krepp requested prosecution data for each year divided by particular crimes, and then presented by District of Columbia ward. The request explicitly stated it was seeking “information regarding the U.S. Department of Justice’s prosecution rates for crimes that have occurred in Washington, D.C. from 2010-2015.” Complaint Exhibit 1. That language was sufficient to put DOJ on notice that Ms. Krepp’s primary goal was to obtain prosecutorial data from the time period of 2010-2015, and that the format in which it was requested (by ward) was secondary to the overall intent of the request. As the courts held in *Nation Magazine* and *Edelman*, DOJ has an obligation to construe Ms. Krepp’s request liberally and provide the primary information sought if it has it in its possession—and it clearly does.

Had DOJ simply provided the data as it was stored by DOJ and indicated to Ms. Krepp that it did not maintain the records in the format in which she requested them, its response would have sufficed and this lawsuit would have been unnecessary. Instead, DOJ imposed an improper hyper-technical reading of Ms. Krepp’s request, presumably in an effort to deny or delay her access to information that was readily available to the agency. As the relevant law demonstrates, this is an unacceptable position and should be rejected.³

C. Ms. Krepp is Not Demanding that DOJ Create Records.

DOJ argues that it would need to create records in order to respond to Ms. Krepp’s FOIA request, and that this is not required under FOIA. MSJ Memo at 14-16. This argument misrepresents Ms. Krepp’s position. She has simply requested prosecutorial data related to certain crimes in the District of Columbia, data that even DOJ acknowledges it maintains in its

³ DOJ’s MSJ Memo misrepresents Ms. Krepp’s position by quoting part of her Complaint out of context. In the MSJ, DOJ states: “Therefore, Plaintiff’s request that Defendant compile and provide the information ‘in the exact format and organization’ [Complaint ¶ 66] she requests should be denied.” MSJ Memo at 16. This quote implies that Ms. Krepp demanded that DOJ only respond in the exact fashion that she requested, which is not the case at all. The full text of Complaint ¶¶ 66-67 provides the appropriate context: “Finally, the DOJ, in its own correspondence to Ms. Krepp affirming the Denial, has admitted that it does maintain at least some of the information sought, but perhaps not in the exact format and organization requested by Ms. Krepp (by Ward, not police district). Such a technicality is not a valid basis for denial of a FOIA request.”

Replicated Criminal Information System (“RCIS”). As discussed above, that the data is stored by police service area or police district and not ward, as Ms. Krepp requested, is not a determining factor in whether the data can be provided. DOJ can provide (and, as discussed below, has provided) prosecutorial data from existing records, and should have done so here.

D. DOJ’s Legal Position Is Contradicted By Its Own Response to an Inquiry From a United States Senator.

Moreover, DOJ *itself* apparently believes that Ms. Krepp’s FOIA request can be interpreted broadly, but only when the request comes to DOJ from the office of a powerful United States Senator. Despite informing Ms. Krepp on multiple occasions that it had no data in response to her request, when the Chairman of the Senate Judiciary Committee stepped in and requested the same data, explicitly referencing Ms. Krepp’s lawsuit, DOJ sang a different tune. In response to Senator Grassley’s inquiries, DOJ provided nearly two dozen pages of prosecutorial data, broken down by the crimes requested by Ms. Krepp and covering the years requested by Ms. Krepp. *See* July 15 Letter at 4-27. The July 15 Letter explicitly states that it is providing “the data for the D.C. Code offenses that best correspond to [Senator Grassley’s] request,” and indicates that the data presented is “maintained in the usual course.” *Id.* at 1. The July 15 Letter also explicitly notes that it is responding to inquiries concerning *this very case*. *Id.* (citing “Krepp v. United States, No. 16-CV-00926-KBJ (D.D.C.)”).

Perhaps most tellingly, the letter concludes: “We hope this information is helpful. Given the good faith efforts by Mr. Phillips and the Department to respond promptly and thoroughly to your requests for additional information, it is our sincere hope that the Committee will proceed as soon as possible in advancing this nomination.” *Id.* at 3. This sentence reveals the true motivations behind DOJ’s sudden willingness to provide prosecutorial data, albeit not to Ms. Krepp. Channing Phillips, the acting U.S. Attorney for the District of Columbia, was nominated

to the position by President Obama on October 8, 2015 and has been awaiting confirmation by the United States Senate ever since. *See* Keith L. Alexander and Ann E. Marimow, “Justice official Channing D. Phillips is nominated as U.S. Attorney for D.C.,” *Washington Post*, October 8, 2015 (<http://wpo.st/q2Wr1>); “Meet the U.S. Attorney,” Department of Justice, <https://www.justice.gov/usao-dc/meet-us-attorney> (“Mr. Phillips’ confirmation is pending with the United States Senate.”). When faced with a private citizen requesting easily-accessible prosecutorial data, DOJ rejects the request by applying an improperly narrow reading to the request; when the U.S. Senator who chairs the committee before which the U.S. Attorney’s nomination is currently pending makes the *same* request, DOJ (properly) reads the request more broadly and promptly turns over the information requested. This type of double standard is one of the core reasons FOIA was enacted, and should not be allowed to persist. *See Robbins Tire*, 437 U.S. at 242 (“The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”); *Sciacca v. F.B.I.*, 23 F. Supp. 3d 17, 25 (D.D.C. 2014) (“FOIA was enacted to facilitate public access to Government documents in order to provide a means for citizens to know what their Government is up to.”) (internal quotations and citations omitted).

Not only does the July 15 Letter reflect an impermissible double-standard, it also provides further evidence that DOJ does, in fact, have the data Ms. Krepp has requested. The Declarations accompanying the MSJ do not explicitly state whether the data Ms. Krepp seeks can easily be provided if sorted by police service area or police district instead of ward, but the July 15 Letter demonstrates that DOJ can (and does) provide this information in such a way to a requester. Although DOJ has provided this data to Senator Grassley’s office, it has not bothered

to provide the same data to Ms. Krepp. *See* Declaration of K. Denise Rucker Krepp (“Krepp Decl.”) at ¶ 5.

E. Plaintiff’s Request For a Fee Waiver Is Valid.

Finally, DOJ argues that Ms. Krepp’s request for a fee waiver under FOIA is “moot” because DOJ did not spend more than two hours on her request for the data, and thus there were no potential fees to impose. Of course, should this Court agree with Ms. Krepp and determine that DOJ is obligated to provide the data she seeks, then her fee waiver request would be valid if DOJ requires additional time to compile the data (or determines that the time and resources it took to draft the July 15 Letter should be treated as FOIA-related expenses). Thus, Plaintiff respectfully requests that this Court affirm her request for a fee waiver should it deny DOJ’s MSJ.

IV. CONCLUSION

The Department of Justice has failed to meet its obligations under FOIA. Not only has it improperly applied a narrow reading of Ms. Krepp’s FOIA request that is contrary to the spirit of FOIA (not to mention applicable FOIA law and DOJ’s own FOIA guidelines), DOJ has demonstrated that it is willing to provide the same data requested by a private citizen, but only when such data can be used to further DOJ’s own goals (namely, the confirmation of a U.S. Attorney by the United States Senate). For these reasons, and as discussed in more detail above, DOJ is not entitled to judgment as a matter of law. Plaintiff respectfully requests that this Court deny DOJ’s Motion for Summary Judgment.

Dated: August 17, 2016

Respectfully submitted,

/s/ John B. Williams III

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

K. DENISE RUCKER KREPP,

Plaintiff,

VS.

UNITED STATES DEPARTMENT OF
JUSTICE,

Defendant.

CIVIL ACTION NO. 16-0926 (KBJ)

**PLAINTIFF'S RESPONSE TO DEFENDANT'S STATEMENT OF MATERIAL
FACTS NOT IN GENUINE DISPUTE AND PLAINTIFF'S STATEMENT OF
GENUINE MATERIAL ISSUES**

Plaintiff response as follows to the numbered paragraphs of Defendant's Statement of Material Facts Not in Genuine Dispute:

1. By electronic mail dated November 5, 2015, Plaintiff K. Denise Rucker Krepp submitted a Freedom of Information Act ("FOIA") request to the Department of Justice, Executive Office of United States Attorneys ("EOUSA"), FOIA/Privacy Unit ("FOIA/PA Unit"). *See* Declaration of Declaration of Tricia Francis, Attorney-Advisor, Freedom of Information Act/Privacy Act Staff, Executive Office for United States Attorneys, United States Department of Justice, ("Francis Decl."), ¶ 4 and Attachment ("Att.") A.

Plaintiff's Response: Not in dispute.

2. The FOIA request stated, in pertinent, part:

► Please provide by category of crime within years 2010 through 2015 (January 1, 2010 - December 31, 2015), the number of criminal homicide, rape, robbery, aggravated assault, burglary, larceny, motor vehicle theft, and arson arrests that DOJ attorneys reviewed by ward. (District of Columbia's wards 1 through 8).

► Please provide information within years 2010 through 2015 (January 1, 2010 - December 31, 2015), the number of criminal homicide, rape, robbery, aggravated assault,

burglary, larceny, motor vehicle theft, and arson cases DOJ attorneys prosecuted by wards 1 through 8. Please separate this information by category of crime.

► Of those prosecuted, what is the conviction rate of each crime within each ward (1-8) between 2010 and 2015 (January 1, 2010 - December 31, 2015)?

► How many criminal homicide, rape, robbery, aggravated assault, burglary, larceny, motor vehicle theft, and arson arrests were resolved by plea deals by ward (1-8) between 2010 and 2015 (January 1, 2010 - December 31, 2015)? Please separate this information by category of crime.

Id., ¶ 4 and Att. A, pp. 2-3. Plaintiff also requested a waiver of fees associated with processing the request, pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). *Id.*, Att. A, p. 3.

Plaintiff's Response: Not in dispute.

3. By letter dated, November 23, 2015, the EOUSA FOIA/PA Unit acknowledged receipt of Plaintiff's request. *Id.*, ¶ 7 and Att. B, p. 1. Plaintiff was informed of the possibility of a fee assessment and that her request was assigned Tracking Number FOIA-2016-00356. *Id.*

Plaintiff's Response: Not in dispute.

4. On December 11, 2015, the EOUSA FOIA/PA Unit received Plaintiff's response to the acknowledgment letter in which she agreed to pay up to \$1,000 for search time. *Id.*, ¶ 8 and Att. C. This response was signed on November 30, 2015. *Id.*

Plaintiff's Response: Not in dispute.

5. By letter dated December 14, 2015, Plaintiff agreed to pay \$1,867 for the processing of the request. *Id.*, ¶ 9 and Att. D.

Plaintiff's Response: Not in dispute.

6. In response to the request, on November 13, 2015, EOUSA FOIA/PA Unit tasked the United States Attorney's Office for the District of Columbia ("USAO-DC") to search for responsive records. *Id.*, ¶ 5. The USAO-DC was tasked because it "serves as both the local and the federal prosecutor for the [District of Columbia] . . . [T]he local . . . prosecutions extend from

misdemeanor drug possession cases to murders.” Francis Decl., ¶ 6 (citing <https://www.justice.gov/usao-dc> (last visited July 27, 2016)).

Plaintiff’s Response: Not in dispute.

7. The FOIA request was sent to the USAO-DC FOIA Coordinator, Supervisory Paralegal Specialist Theresa D. Jones. Declaration of Theresa D. Jones, Supervisory Paralegal Specialist, Civil Division, United States Attorney’s Office for the District of Columbia, United States Department of Justice (“Jones Decl.”), ¶ 6.

Plaintiff’s Response: Not in dispute.

8. Ms. Jones reviewed the FOIA request and determined that a search for responsive records should be conducted by the Applications Information Management Unit of USAO-DC. *Id.*, ¶ 8.

Plaintiff’s Response: Not in dispute.

9. On or about December 15, 2015, Petula Coon, Supervisor, Applications Information Management Unit, USAO-DC, reviewed the FOIA request and determined that “Plaintiff was requesting a report that would display specific statistical information about [District of Columbia] Superior Court cases that were filed between the years of 2010 and 2015 and were associated with specific arrest charges, prosecutions and plea agreements.” Petula Coon, Supervisor, Applications Information Management Unit, United States Attorney’s Office for the District of Columbia, United States Department of Justice (“Coon Decl.”), ¶ 6.

Plaintiff’s Response: Not in dispute.

10. From a review of the FOIA request, Ms. Coon also understood Plaintiff to request “that the generated statistical information be displayed in groups by year of filing, specific arrest charge, and District of Columbia ward area.” *Id.*

Plaintiff's Response: Not in dispute.

11. As a result, Ms. Coon determined that a location which could contain responsive records was the Replicated Criminal Information System ("RCIS"). *Id.*, ¶ 7.

Plaintiff's Response: Not in dispute.

12. The Replicated Criminal Information System is a case management system for District of Columbia "Superior Court cases based on arrests and court data transferred daily to the USAO-DC. The system allows for search capabilities and generates electronic forms for case preparation." *Id.*, ¶ 8.

Plaintiff's Response: Not in dispute.

13. "Within RCIS, data regarding arrests for types of crime is collected and organized by District of Columbia Police District and Police Service Area ("PSA") in which the crime occurs." *Id.*, ¶ 9.

Plaintiff's Response: Not in dispute.

14. For purposes of policing, the District of Columbia "is divided into seven Police Districts, each of which is further subdivided into seven or more Police Service Areas (PSAs)." *Id.*, ¶ 10 (citing <http://mpdc.dc.gov/page/mpdc-who-we-are>) (last visited July 21, 2016)). *See id.* (citing <http://mpdc.dc.gov/page/police-districts-and-police-service-areas> (last visited July 21, 2016)).

Plaintiff's Response: Not in dispute.

15. The District of Columbia is divided into eight wards. *Id.*, ¶ 11 (citing <http://dccouncil.us/pages/learn-about-wards-and-ancs>) (last visited July 21, 2016). The boundaries of the wards are similar, but not identical to, the Police Districts. *Id.*, Exhibit ("Ex."). A.

Plaintiff's Response: Not in dispute.

16. By letter dated December 14, 2015, Plaintiff agreed to pay up to \$1,867 for the processing of the FOIA request. Francis Decl., ¶ 9, Ex. D.

Plaintiff's Response: Not in dispute.

17. Because Ms. Coon was familiar with “the types of data that is stored within the RCIS system, [she] knew that the RCIS system did not store information pertaining to arrest activities within a District of Columbia ward area. Nevertheless, [she] entered the system to again review the manner in which case information concerning arrests, prosecutions and plea agreements is stored. [Her] review confirmed that case information pertaining to arrests handled by the USAO-DC, is maintained according to the Police District and Police Service Area in which a crime is committed, not by the ward in which a crime is committed.” Coon Decl., ¶ 12.

Plaintiff's Response: Not in dispute.

18. “Within RCIS, data regarding prosecutions for types of crime is linked to the data regarding arrests. Therefore, it also is organized by District of Columbia Police District and Police Service Area, not by ward.” *Id.*, ¶ 13.

Plaintiff's Response: Not in dispute.

19. “Within RCIS, there is no flag or tracking indicator for identifying plea agreements. Hence, there is no retrieval method for this information.” *Id.*, ¶ 14.

Plaintiff's Response: Plaintiff does not have sufficient knowledge as to the truthfulness of this assertion.

20. Accordingly, Ms. Coon was “unable to retrieve the specific information sought in the FOIA request.” *Id.*, ¶ 15.

Plaintiff's Response: Plaintiff disputes that Ms. Coon (and by extension, DOJ) was unable to provide the specific information sought in Ms. Krepp's FOIA request. Although the data sought may not be maintained by ward, DOJ has acknowledged that the same data is maintained by police district and/or police service area. Thus, DOJ was able to retrieve the information sought in the FOIA request. DOJ itself has compiled the data requested and produced it to a third party (United States Senator Charles Grassley). *See* Exhibit 1 to this Opposition.

21. Ms. Coon was unaware of "any other method or means by which a further search could be conducted in RCIS that would likely uncover the . . . records [requested]." *Id.*, ¶ 17.

Plaintiff's Response: Plaintiff disputes that Ms. Coon (and by extension, DOJ) had no method of uncovering the requested records. DOJ was able to retrieve the information sought in the FOIA request. DOJ itself has compiled the data requested and produced it to a third party (United States Senator Charles Grassley). *See* Exhibit 1 to this Opposition.

22. Ms. Coon was unaware of "any other locations or information systems within USAO-DC where records responsive to Plaintiff's request [were] likely to be located because the RCIS system is the primary case management system used by USAO to store and maintain Superior Court case-related information." *Id.*

Plaintiff's Response: Not in dispute.

23. On December 15, 2015, Ms. Coon informed the FOIA Coordinator for the USAO-DC that she was unable to retrieve the requested information. *Id.*, ¶ 16 and Ex. B.

Plaintiff's Response: Plaintiff does not dispute that Ms. Coon informed the FOIA Coordinator that she was unable to retrieve the requested information. As discussed above, Plaintiff disputes that DOJ truly was unable to provide the requested information.

24. On December 16, 2015, Ms. Jones provided this information to the EOUSA FOIA/PA Unit. Jones Decl., ¶ 16.

Plaintiff's Response: Not in dispute.

25. By letter dated January 5, 2016, the EOUSA FOIA/PA Unit advised Plaintiff, *inter alia*, that:

A search for records located in the United States Attorney's Office(s) for the District of Columbia has revealed no responsive records regarding the above subject. The USAO does not track this information[.]

Francis Decl., ¶ 11 and Att. E. Plaintiff also was advised that if she was "not satisfied with [the] response to [her] request, [she could] administratively appeal by writing to the Director, Office of Information Policy (OIP) Department of Justice[.]" *Id.*, Att. E.

Plaintiff's Response: Plaintiff does not dispute the contents of the January 5, 2016 letter, but does dispute the conclusion that there are "no responsive records regarding the ... subject." As discussed above, Plaintiff disputes that DOJ truly was unable to provide the requested information.

26. By letter dated January 8, 2016, Plaintiff requested the status of her FOIA request. This letter was received by EOUSA on February 2, 2016. *Id.*, ¶ 12 and Att. F. Plaintiff indicated that she was "willing to pay . . . \$1000 plus an additional \$1000 [to process the request]." *Id.*

Plaintiff's Response: Not in dispute.

27. However, EOUSA did not assess any fees for the processing of the FOIA request. *Id.*, ¶ 17. EOUSA also did not adjudicate Plaintiff's request for a fee waiver because, "in under two hours of search time," the USAO-DC determined that it did not possess records responsive to Plaintiff's request. *Id.* (citing 5 U.S.C. § 552(a)(4)(A)(iv)(II)).

Plaintiff's Response: Plaintiff disputes that DOJ does not possess records responsive to her request. DOJ collected and produced records responsive to Ms. Krepp's request to United States

Senator Charles Grassley. *See* Exhibit 1 to this Opposition. Plaintiff does not dispute that DOJ's (incorrect) determination took less than two hours of search time, which did not require adjudication of a fee waiver. However, had DOJ performed a proper search and collection of information (like the one it did when providing the information to Senator Grassley), such efforts would have required additional time and fees, necessitating adjudication of Plaintiff's request for a fee waiver.

28. By letter dated January 21, 2016, Plaintiff filed an administrative appeal with the Department of Justice, Office of Information Policy ("OIP"). Francis Decl., ¶ 13 and Att. G.

Plaintiff's Response: Not in dispute.

29. By letter dated February 4, 2016, OIP acknowledged receipt of Plaintiff's appeal and assigned it Appeal No. AP-2016-01425. *Id.*, ¶ 14 and Att. H.

Plaintiff's Response: Not in dispute.

30. By letter dated February 2, 2016, OIP mistakenly again acknowledged receipt of Plaintiff's appeal, assigning it Appeal No. AP-2016-01556. *Id.*, and Att. I.

Plaintiff's Response: Not in dispute.

31. By letter dated March 16, 2016, OIP affirmed EOUSA FOIA/PA Unit's response to Plaintiff's request. *Id.*, ¶ 15 and Att. J. OIP also indicated that Plaintiff's appeal in No. AP-2016-01556 was a duplicate of Appeal No. AP-2016-01425. Accordingly, Appeal No. AP-2016-01425 was adjudicated and AP-2016-01556 was administratively closed. *Id.*

Plaintiff's Response: Not in dispute.

32. The March 16, 2016 letter also indicated that the USAO-DC conducted an "adequate, reasonable search" for responsive records. *Id.*, ¶ 16 and Att. J, p. 1.

Plaintiff's Response: Plaintiff does not dispute that the March 16, 2016 letter stated that USAO-DC conducted an "adequate, reasonable search." Plaintiff disputes the characterization of DOJ's efforts as "adequate" and "reasonable." As discussed above, Plaintiff disputes that DOJ truly was unable to provide the requested information.

33. The OIP's affirmance also stated,

[p]lease be advised that police service areas, also known as the districts, are used for reporting purposes. The USAO does not track this information by ward or in the specific manner which you are requesting.

Id.

Plaintiff's Response: Plaintiff does not dispute that the affirmance contained this language. Plaintiff does not have sufficient knowledge as to the truthfulness of this assertion.

34. OIP also stated,

[b]ased on the type of records that you appear to be seeking, you might wish to make a new request to EOUSA for prosecutions and convictions by crime or by district. I trust that this information will be of some assistance to you as you attempt to locate these records.

Id., Att. J, p. 1, n.1.

Plaintiff's Response: Plaintiff does not dispute that the affirmance contained this language. Plaintiff disputes that a new, separate FOIA request would be necessary to obtain the information she originally sought. As discussed above, Plaintiff disputes that DOJ truly was unable to provide the requested information.

35. Finally, Plaintiff was informed that, "[i]f [she was] dissatisfied with [the] action on [the] appeal, the FOIA permit[ted her] to file a lawsuit in federal district court[.]" *Id.* at 2.

Plaintiff's Response: Not in dispute.

36. On May 16, 2016, Plaintiff filed the instant lawsuit. ECF No. 1.

Plaintiff's Response: Not in dispute.

/s/ John B. Williams III

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