

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVITA INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF HEALTH &
HUMAN SERVICES *et al.*,

Defendants.

Civil Action No. 20-1798 (BAH)

Chief Judge Beryl A. Howell

MEMORANDUM OPINION

Plaintiff DaVita Inc., “a leading provider of life-sustaining dialysis treatment for patients with severe kidney disease,” Pl.’s Mem. Supp. Pl.’s Cross-Mot. Summ. J. & Opp’n Defs.’ Mot. Summ. J. (“Pl.’s Opp’n”) at 1, ECF No. 17-1; *see also* Compl. at 2 ¶ 3, ECF No. 1,¹ challenges the response of defendants, the U.S. Department of Health and Human Services (“HHS”) and the Centers for Medicare and Medicaid Services (“CMS”), to a request submitted pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, for records consisting of thirty-six public comments submitted more than thirty years ago, in 1990, regarding a proposed rule that was finalized in 1995 (the “FOIA Request”), Defs.’ Mot. Summ. J. (“Defs.’ Mot.”), Ex. A, Decl. of Hugh Gilmore (“Gilmore Decl.”), Ex. 1, FOIA Request at 3, ECF No. 14-3; *see also* Compl. ¶ 7. Specifically, plaintiff alleges in a single claim that defendants have not fulfilled their obligation under FOIA to “release records sought through” the FOIA Request, Compl. at 5 ¶ 2; *see also id.* at 5 ¶¶ 1–4, because they conducted an inadequate search for responsive records, *see* Pl.’s Opp’n at 1–2.

¹ The numbering of paragraphs in plaintiff’s Complaint restarts from 1 at page 5. *See* Compl. at 5. To avoid confusion, citations are to the page and paragraph number when referring to duplicated paragraph numbers in the Complaint.

Pending before the Court are the parties' cross-motions for summary judgment. Defs.' Mot., ECF No. 14; Pl.'s Cross-Mot. Summ. J. ("Pl.'s Mot."), ECF No. 17. For the reasons set forth below, both parties' motions are denied.

I. BACKGROUND

Plaintiff's FOIA Request is briefly described below, followed by review of defendants' responses to the Request both before and after initiation of this lawsuit.

A. The FOIA Request

In March 1990, HHS's Health Care Financing Administration, a predecessor subagency to CMS, sought comments on a Notice of Proposed Rulemaking setting forth a proposed rule to implement provisions of the Medicare Secondary Payer Act ("MSP Act"), 42 U.S.C. § 1395y(b), entitled *Medicare Program; Medicare Secondary Payer for Disabled Active Individuals* (the "Proposed Rule"), 55 Fed. Reg. 8,491 (Mar. 8, 1990). This rulemaking process resulted in a final rule, promulgated in 1995, entitled *Medicare Program; Medicare Secondary Payer for Individuals Entitled to Medicare and Also Covered Under Group Health Plans* (the "Final Rule"). 60 Fed. Reg. 45,344 (Aug. 31, 1995) (codified at 42 C.F.R. §§ 400, 411). The Final Rule specified that the agency had "received 36 timely letters of comment from employers, insurance companies, law firms, actuarial firms, individuals, associations (two business and one medical), and beneficiary rights organizations" in response to its Proposed Rule. *Id.* at 45,349.

Plaintiff is currently litigating the meaning and application of the MSP Act and its implementing regulations in several lawsuits. Pl.'s Statement of Undisputed Material Facts ("Pl.'s SMF") ¶ 4, ECF No. 17-2; *see also, e.g., DaVita Inc. v. Amy's Kitchen, Inc.*, 981 F.3d 664, 670–71 (9th Cir. 2020), *pet. for reh'g filed*, Pet. Panel Reh'g or Reh'g En Banc, No. 19-15963 (9th Cir. Jan. 7, 2021), ECF No. 78; *DaVita Inc. v. Marietta Mem'l Hosp. Emp. Health Benefit Plan*, 978 F.3d 326, 353 (6th Cir. 2020); Mot. to Stay Mandate Pending Filing of Pet. for

Writ of Cert., *Marietta Mem'l Hosp. Emp. Health Benefit Plan*, No. 19-4039 (6th Cir. Dec. 30, 2020), ECF No. 81. As part of the preparation for that litigation, on November 22, 2019, plaintiff submitted a FOIA request to CMS, seeking “access to the comments that were submitted on the Proposed Rule,” in particular, “copies of all 36 comments” referenced in the Final Rule, “in PDF format if possible.” FOIA Request at 3. Plaintiff also “ask[ed]” that the FOIA Request “receive expedited processing because the comments may be materially relevant to the outcome of an ongoing federal court case.” *Id.*

B. Processing of the FOIA Request and Procedural History

CMS acknowledged receipt of the FOIA Request on November 22, 2019. Gilmore Decl. ¶ 3, ECF No. 14-2; Defs.’ Statement of Material Facts as to Which There Is No Genuine Issue (“Defs.’ SMF”) ¶¶ 3, 5, ECF No. 14-1; Pl.’s Resp. Defs.’ Statement of Material Facts as to Which There Is No Genuine Dispute (“Pl.’s Resp. SMF”) ¶¶ 3, 5, ECF No. 17-2. On December 4, 2019, CMS denied plaintiff’s request for expedited processing and advised that the FOIA Request would therefore be processed “in accordance with th[e] agency’s ‘first in, first out’ practice.” Gilmore Decl., Ex. 2, Letter from Jay Olin, Director, Division of FOIA Analysis-C, FOIA Group, CMS, to Andrew Tutt, Arnold & Porter Kaye Scholer LLP (“Arnold & Porter”) (Dec. 4, 2019) at 1, ECF No. 14-3; *see also* Pl.’s SMF ¶ 12; Defs.’ Reply Pl.’s Statement of Undisputed Material Facts (“Defs.’ Resp. SMF”) ¶ 12, ECF No. 19-2; Defs.’ SMF ¶ 6; Pl.’s Resp. SMF ¶ 6. Plaintiff has not appealed the denial of its expedition request, *see* Gilmore Decl. ¶ 8; Defs.’ SMF ¶ 9, and does not challenge the timeliness of defendants’ response to the FOIA Request in this litigation.

1. Initial Search for Comments

CMS then began its search for responsive records. According to the Director of the FOIA Group for CMS’s Office of Strategic Operations and Regulatory Affairs (“OSORA”), who

is also CMS's FOIA Officer, Gilmore Decl. ¶ 1, after plaintiff's expedition request was denied, the FOIA Request "was assigned to the complex track" for further action because of the possibility that it would require "searches . . . of multiple offices and possibly warehouses based on the age of the records" requested, *id.* ¶ 13. Following the "first in, first out" processing procedures of this track, the FOIA Group assigned the FOIA Request to OSORA based on the regulatory nature of the records sought by plaintiff. *Id.* ¶ 14. On March 20, 2020, OSORA "advised" the FOIA Group that records from a rulemaking that began in 1990, such as those requested by plaintiff, "would likely be dispositioned to the National Archives and Records Administration ('NARA')" for storage and eventual archiving because of their age and recommended that plaintiff "be directed there." *Id.* ¶ 15. To investigate whether the records had been transferred to NARA, "OSORA transferred the FOIA Request to the Regulations Development Group ('RDG')," *id.* ¶ 16, which is the office "responsible for CMS'[s] process for vetting, developing, and publishing regulations and liais[ing] with the Office of Management and Budget for regulation publication in the national *Federal Register*," *id.* ¶ 24.

In April 2020, approximately four months after submission of the FOIA Request, plaintiff requested that CMS "furnish the requested records as soon as possible," Gilmore Decl., Ex. 3, Letter from John P. Elwood, Arnold & Porter, to Jay Olin, Director, Division of FOIA Analysis-C, FOIA Group, CMS (Apr. 3, 2020) at 1, ECF No. 14-3; *see also id.* ¶ 6, and that the agency describe its "plans for addressing" the FOIA Request, *id.*, Ex. 4, Email from Sam Callahan, Arnold & Porter, to Hugh P. Gilmore & Joseph Tripline, OSORA, CMS (Apr. 13, 2020, 3:28 PM) at 1, ECF No. 14-3; *see also id.* ¶ 7; Defs.' SMF ¶¶ 7-8; Pl.'s Resp. SMF ¶¶ 7-8. Three months later, on July 2, 2020, having received no response from defendants, Defs.' SMF ¶ 9;

Pl.'s Resp. SMF ¶ 9, plaintiff initiated this litigation, *see* Compl.; Defs.' SMF ¶ 10; Pl.'s Resp. SMF ¶ 10.

2. *Use of Archives Records Center Information System ("ARCIS")*

In the meantime, CMS continued its search for records responsive to the FOIA Request, which was now assigned to RDG. RDG uses a tracking system called Regulations Records Management ("RRM") to locate records related to past rulemakings and other agency proceedings. Gilmore Decl. ¶ 16. This system allows RDG to locate any transfer number or other information about records storage that is associated with a particular set of records. The existence of an associated transfer number indicates that the records have begun the process of transitioning from CMS to NARA custody. *See id.* ¶¶ 15–16, 25. At the first step of this process, records remain in the agency's custody but are kept in temporary storage at a Federal Records Center ("FRC") operated by NARA. At the second step, triggered by the close of a retention period determined by the agency's relevant records retention policies, the records are permanently dispositioned from the FRC to NARA. *See id.* ¶¶ 16, 19, 25. "CMS can request records when they are still at the FRC, but once the records get accessioned by NARA, CMS no longer has physical or legal custody of them." *Id.* ¶ 19. When RDG's search of RRM produces a transfer number or other information relevant to locating a particular set of records, RDG "provides that information" to CMS's Division of Records Information Systems ("DRIS"), *id.* ¶ 16; *see also id.* ¶ 26, the office "responsible for CMS records management standards and develop[ing] policies and procedures to ensure the availability of CMS records and programs," *id.* ¶ 17. DRIS may be able to use the information generated by RRM "to track the records[]" location." *Id.*

RDG transferred the FOIA Request to DRIS, apparently without conducting an initial RRM search, "because the age of the records indicated that records management retention rules

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