UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE NEW YORK TIMES COMPANY, Plaintiff, v. DEFENSE HEALTH AGENCY and DEPARTMENT OF HEALTH AND HUMAN SERVICES, Defendants.	Civil Action No. 21-cv-566 (BAH) Chief Judge Beryl A. Howell

MEMORANDUM OPINION

Plaintiff, The New York Times Company ("NYT"), seeks a preliminary injunction to compel defendants, the Defense Health Agency ("DHA"), a component of the United States Department of Defense, Compl. ¶ 3, ECF No. 1, and the United States Department of Health and Human Services ("HHS"), to respond and produce, on an expedited basis and by a date certain "20 business days of the Court's order," all non-exempt records responsive to plaintiff's December 24, 2020 requests, pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, for extensive data regarding the federal government's nationwide effort to distribute coronavirus vaccines to the American public, Pl.'s Mot. Preliminary Injunction ("Pl.'s Mot.") at 1–2, ECF No. 8; Compl. ¶¶ 8, 16–17.[1] Defendants object that this request for extraordinary injunctive relief amounts to a litigation tactic "to jump the line on all other FOIA requesters—including numerous other COVID-related requests—" when the gravamen of "[p]laintiff's legal

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[1] Plaintiff initially requested an order compelling defendants' response to the FOIA request at issue "on or before March 31, 2021," Pl.'s Mot. at 1, but the parties subsequently proposed a briefing schedule for the requested injunctive relief proposing completion of briefing, after that date, by April 1, 2021, *see* Parties' Joint Status Report, ECF No. 12, which proposed schedule was adopted by the Court, *see* Min. Order (Mar. 15, 2021).

claim is nothing more than a complaint that more than twenty days have passed since the submission of the FOIA requests, for which the remedy is constructive exhaustion of administrative remedies and the opportunity for court supervision of the processing and production—not an order that Defendants immediately process and make productions ahead of all other FOIA requests." Defs.' Opp'n to Pl.'s Mot. Preliminary Injunction ("Defs.' Opp'n") at 1, ECF No. 14. Defendants are correct and, for the reasons explained more fully below, plaintiff's motion is denied.

I.   BACKGROUND

On December 24, 2020, plaintiff submitted identical FOIA requests to DHA and HHS seeking expedited processing and production of four categories of data "from the Defense Health Agency ('DHA')," regarding the federal government's distribution of COVID-19 vaccines. Defs.' Opp'n, Ex. A, Decl. of Brandon Gaylord, HHS Freedom of Information/Privacy Act Director ("Gaylord Decl."), Ex. A (Dec. 24, 2020 Letter from Alexandra Settelmayer, NYT Legal Dep't, to HHS ("HHS FOIA Request") at 15, ECF No. 14-1); *id.*, Ex. B, Decl. of John Boyer, DHA Freedom of Information/Privacy Act Manager ("Boyer Decl."), Ex. A (Dec. 24, 2020 Letter from Alexandra Settelmayer, NYT Legal Dep't, to DHA ("DHA FOIA Request") at 9, ECF No. 14-2).[2] The requests seek a massive volume of "de-identified" data, broken down by state, geographic zip code and/or county, about vaccination distribution, recipient demographics, including race, ethnicity, age group and occupation, comorbidities, priority groups, usage and waste, providers, manufacturers, and adverse reactions. Specifically, the requests seek DHA records regarding:

> [1.] Aggregate, de-identified data, broken down by zip code and county of the recipient, showing the number of individuals who have received one dose of a

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[2]   Citations to exhibits to declarations use the pagination automatically assigned by the Court's Case Management/Electronic Filing (CM/ECF) system.

coronavirus vaccine . . .[and the] aggregate, de-identified data, broken down by zip code and county of the recipient, showing the number of individuals who have been fully vaccinated . . that [is also] . . . [each] broken down by: [t]he race, ethnicity, and age group of vaccine recipients; [t]he comorbidities associated with vaccine recipients; [t]he Vaccination Priority Group (i.e. Phase 1a, Phase 1b) associated with the vaccine recipients; [t]he vaccine recipients' status as a health care worker, long-term care facility resident, or member of any other priority group or profession; [t]he manufacture of the vaccine; and [t]he "administered location type" field entry (as defined by the CDC's Covid-19 Vaccination Reporting Specification).

[2.] All available data showing the number of coronavirus vaccine doses that were allocated and distributed to each vaccine provider, broken down by state, county, and zip code.

[3.] All available de-identified data regarding allergic or adverse reactions to a coronavirus vaccine, including but not limited to the data tracked by the V-SAFE data system.

[4.] All available data showing the number of coronavirus vaccine doses that were distributed but not administered, including any records showing the reasons why those doses were not administered.

DHA FOIA Request at 9–10; HHS FOIA Request at 15–16.

Citing the "urgent demand to inform the public as to how [COVID-19] vaccines are being distributed by the federal government," "whether healthcare providers are administering vaccinations in an equitable way," DHA FOIA Request at 11, and to "facilitat[e] public trust in the COVID-19 vaccines" by "helping the public to understand the number of vaccinations that have been administered," *id.* at 12, plaintiff requested expedited processing from both DHA and HHS within "the ten . . . working day time limit set by law," *id.* at 13 (citing 32 C.F.R. § 286.8(e)(1) and 5 U.S.C. § 552(a)(6)(E)(ii)(I)).[3]

On January 26, 2021, DHA provided an "interim response" acknowledging receipt of plaintiff's FOIA request and granting a fee waiver, but denying the request for expedited

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[3]   Given that the DHA Request and the HHS Request are identical, except for the recipient's address block at the top of the request, only the DHA Request is cited.

processing because plaintiff had not demonstrated a "compelling need" for such processing.

Boyer Decl., Ex. B, Letter from DHA to Alexandra Settelmayer, NYT Legal Department (Jan.

26, 2021) ("DHA Response Letter") at 16–17. DHA explained that plaintiff's request was

placed in the "complex queue," with an "estimated completion date [of] December 2021," *id*. at

16, due to "unusual circumstances," including "(a) the need to search for and collect records

from a facility geographically separated from [the] office; (b) the potential volume of records

responsive to [the] request; (c) the need for consultation with one or more agencies which have

substantial interest in either the determination or the subject matter of the records; and (d) an

unusually high volume of requests," *id.*; *see also* Compl. ¶ 10. Noting the anticipated large

volume of data responsive to plaintiff's request, DHA stated that the response "will require a

very lengthy search across the military health system," and may require further processing

because the "[r]ecords sought may not be in the format and availability Plaintiff expects." Boyer

Decl. ¶ 16.

On February 8, 2021, HHS also acknowledged receipt of plaintiff's FOIA request and,

because the request "sought records from DHA, includes references to DHA throughout the

request and references DHA's FOIA regulations," Gaylord Decl. ¶ 8, HHS sought clarification

whether the request was "mistakenly routed to the incorrect agency," *id*. ¶ 9. Plaintiff made

efforts to respond but nothing further was heard from HHS prior to the filing of this lawsuit.

Pl.'s Reply, Ex. A, Decl. of Alexandra Settelmayer ("Settelmayer Decl.") ¶ 5, ECF No. 16

(noting plaintiff's efforts to respond via voicemail and email, on Feb. 8, 11, 12, 2021).[4] HHS

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[4]   HHS initially reported that "[p]laintiff never responded to [the] clarifying email," Gaylord Decl. ¶ 9, but on April 8, 2021, conceded that plaintiff's "response emails were mistakenly missed in the course of performing [the] office's responsibilities," Not. of Correction to Gaylord Decl., Attach. A, Second Decl. of Brandon Gaylord ("2d Gaylord Decl.") ¶ 7, ECF No. 19-1, and that, while HHS did not receive Ms. Settelmayer's voicemail, because "the office [is] in 100% telework [and] the main line is not answered," he had "no reason to doubt [Ms. Settelmayer's]" claim that she left a voicemail, *id*. ¶ 8. Plaintiff's email messages did not clarify that the HHS FOIA Request sought the four categories of data from HHS records, rather than DHA records. *See* Settelmayer Decl., Ex. B, Email

began processing plaintiff's FOIA request only after this lawsuit was filed and, absent any

clarification from plaintiff, HHS understands that the HHS FOIA Request, as plainly written,

seeks production of responsive "DHA records in HHS' possession." Gaylord Decl. ¶ 10.

Plaintiff initiated this lawsuit on March 3, 2021, asserting a single claim that "Defendants

have failed to meet the statutory deadlines set by FOIA, 5 U.S.C. §§ 552(a)(6)(A)(i),

552(a)(6)(B)(i)," such that "Plaintiff is deemed to have exhausted its administrative remedies

under FOIA." Compl. ¶ 13. As relief, plaintiff sought an order that defendants each "undertake

an adequate search for the requested records and provide those records to Plaintiff within 20

business days of the Court's order." *Id*. ¶¶ 16-17. In a cursory factual reference, plaintiff noted

that DHA "denied The Times's request for expedited processing," *id*. ¶ 10, but otherwise

asserted no claim that defendants violated any part of FOIA's provisions, under 5 U.S.C. §§

552(a)(6)(E), governing expedited processing or demanded no relief from those denials. A week

later, on March 11, 2021, plaintiff moved for preliminary injunctive relief compelling defendants

to respond with virtually immediate production of records responsive to the FOIA requests,

which motion is ripe for resolution.

II.   LEGAL STANDARD

A preliminary injunction "is a stopgap measure, generally limited as to time, and

intended to maintain a status quo or 'to preserve the relative positions of the parties until atrial on

the merits can be held.'" *Sherley v. Sebelius*, 689 F.3d 776, 781–82 (D.C. Cir. 2012) (quoting

Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981)). To obtain relief, a plaintiff seeking a

preliminary injunction must establish that (1) they are "likely to succeed on the merits"; (2) they

are "likely to suffer irreparable harm in the absence of preliminary relief"; (3) "the balance of

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Correspondence between Natasha Taylor, HHS Government Information Specialist, and Alexandra Settelmayer
(Feb. 8, 2021) at 2–3, ECF No. 16-2.

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