UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 1:22-cv-24204-KMM

RIFKIN & FOX-ISICOFF, P.A.,

Plaintiff,

v.

UNITED STATES CITIZENSHIP AND
IMMIGRATION SERVICES,

Defendant.
_________________________________/

REPORT AND RECOMMENDATIONS

THIS CAUSE is before the Court upon Plaintiff Rifkin & Fox-Isicoff, P.A.'s Motion for Award of Attorneys' Fees and Costs. (ECF No. 14). Defendant United States Citizenship and Immigration Services ("USCIS") filed a response (ECF No. 18), to which Plaintiff filed a reply (ECF No. 19). Plaintiff additionally filed Notices of Supplemental Authority (ECF Nos. 20, 22). The matter has been referred to the undersigned by the Honorable K. Michael Moore, United States District Judge, to take all necessary and proper action as required by law and/or issue a Report and Recommendation regarding Plaintiff's Motion. (ECF No. 17). Having reviewed the Motion, Response, Reply, Notices of Supplemental Authority, the record as a whole, and being otherwise fully advised in the premises, the undersigned respectfully **RECOMMENDS** that Plaintiff's Motion be **GRANTED**.

I. BACKGROUND

This suit arises from Plaintiff submitting a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 to USCIS.[1] Plaintiff is a law firm that specializes in immigration matters. On May 11, 2022, Plaintiff submitted a FOIA request seeking documents related to the I-924 petitions.[2] Specifically, Plaintiff sought the number of I-924 petitions pending the date the program was discontinued, when the petitions were filed, processing times for all petitions, the adjudication process of the petitions, documents pertaining to the purpose of the I-924 fees, and the total fees collected.

That same day USCIS acknowledged receipt of the request, and requested Plaintiff to clarify certain requests. Plaintiff provided the requested clarification eight days later. Defendant then notified Plaintiff that its goal was to respond within 20 business days of receipt of the request, noting further that FOIA permits a 10-day extension in certain circumstances.

Plaintiff filed suit on December 27, 2022, and by that date Plaintiff had not received records responsive to its request. The Parties filed a Joint Scheduling Report and Proposed Schedule ("JSR"), (ECF No. 11). In the JSR, the Parties agreed to deadlines for the briefing of dispositive motions, but were not in agreement as to whether the Court should enter firm deadlines for USCIS to produce responsive documents. Defendant represented that it intended to produce by certain dates, but objected to the Court ordering deadlines certain for production. In response to the JSR, the Court entered a Scheduling Order that commanded Defendant to produce all non-exempt documents by June 5, 2023.

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[1] The following facts are taken from Plaintiff's Complaint that are admitted by Defendant in its Answer. *See* (ECF Nos. 1, 10).

[2] The I-924 program was an immigrant investor program that was discontinued in June of 2021.

Defendant produced documents responsive to Plaintiff's requests on March 1, 2023 and April 25, 2023. USCIS later moved to dismiss the Complaint as moot, without opposition from Plaintiff, as it had provided Plaintiff with responsive documents. The District Court granted Defendant's Motion.

II. DISCUSSION

A. Eligibility for an Award of Fees and Costs

Plaintiff moves for an award of attorney's fees and costs under FOIA. "Under FOIA, an award of reasonable attorneys' fees and costs is discretionary and may be assessed against the United States when the complainant has substantially prevailed." *Villanueva v. U.S. Dep't of Just., et al.*, No. 19-23452-CIV, 2021 WL 4342004, at *24 (S.D. Fla. Aug. 12, 2021), *report and recommendation adopted*, No. 19-23452-CIV, 2021 WL 4338976 (S.D. Fla. Sept. 23, 2021).

FOIA's fee provision divides the attorney-fee inquiry into two prongs, fee eligibility and fee entitlement. *Id.* "Under FOIA, the party seeking an award of attorneys' fees bears the burden of establishing eligibility, entitlement and reasonableness." *Id.* at 25. "The eligibility prong asks whether a plaintiff has 'substantially prevailed' and thus 'may' receive fees." *Brayton v. Off. of the U.S. Trade Representative*, 641 F.3d 521, 524 (D.C. Cir. 2011). "If so, the court proceeds to the entitlement prong and considers a variety of factors to determine whether the plaintiff *should* receive fees." *Id.*

In determining eligibility, "[t]he statute does not authorize courts to assess what it means to 'prevail' (substantially or otherwise) in a FOIA case in the abstract." *Conservation Force v. Jewell*, 160 F. Supp. 3d 194, 201 (D.D.C. 2016). Rather, the statute provides, in relevant part:

> (ii) For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either—
>
> > (I) a judicial order, or an enforceable written agreement or consent decree; or

> (II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.

5 U.S.C. § 552(a)(4)(E)(ii). Plaintiff invokes both subsections as the basis for its fee request. Plaintiff argues that it is eligible for fees based on this Court's Scheduling Order, which set a deadline for USCIS to produce non-exempt records; and based on USCIS's change in position since the initiation of this litigation.

Defendant argues that the Scheduling Order does not render Plaintiff eligible for fees because it was a procedural order rather than an adjudication on the merits of the case. Defendant refutes that the Court ordered USCIS to produce records by a certain date, characterizing the deadline to produce as *dicta*.

The Court's Scheduling Order followed the Parties' JSR, (ECF No. 11). In the Parties' JSR, the Parties agreed to the deadlines for the briefing of dispositive motions, but were not in agreement as to whether the Court should enter firm deadlines for USCIS to produce responsive documents. USCIS opposed the entry of deadlines by the Court for production, but represented that it anticipated it would produce its initial production of responsive documents by March 1, 2023; its second production by April 3, 2023; and any additional production by May 15, 2023. After review of the JSR, the Court entered its Scheduling Order requiring Defendant to complete all necessary review and production of non-exempt documents by no later than June 5, 2023 in order to decide the Motions for Summary Judgment on a complete and static record by the date the Motions were filed. Prior to the Parties' JSR and entry of this Court's Order, USCIS "was not under any judicial direction to produce documents by specific dates; the order changed that by requiring [USCIS] to produce all responsive documents by the specified date[ ]." *Jud. Watch, Inc. v. U.S. Dep't of Just.*, 774 F. Supp. 2d 225, 229 (D.D.C. 2011) (cleaned up); *Jud. Watch, Inc. v. F.B.I.*, 522 F.3d 364, 368 (D.C. Cir. 2008) ("[O]nce an order has been adopted by the court,

requiring the agency to release documents, the legal relationship between the parties changes.") (emphasis in original).

Defendant's contention that the Court-ordered deadline of June 5, 2023 was *dicta* is erroneous. Rather than rely solely upon Defendant's estimated dates of production, the Court ordered Defendant to produce by a date certain. If Defendant failed to comply with producing responsive documents or delayed disclosure, it would have been subject to contempt. *See Jud. Watch, Inc. v. F.B.I.*, 522 F.3d at 368–70 (holding that the plaintiff had prevailed because "the parties had stipulated that the defendant agency would produce the requested records by a date certain and the trial court approved the parties' joint stipulation."); *Davy v. C.I.A.*, 456 F.3d 162 (D.C. Cir. 2006) (holding that the plaintiff had prevailed on the basis of a joint stipulation, approved by the district court, that the defendant would provide "all responsive documents, if any," by certain dates).

Defendant cites to *Conservation Force v. Jewell* in support of its argument that Plaintiff is not entitled to relief because Plaintiff was not provided relief on the merits of its claim. 160 F. Supp. 3d 194, 203–04 (D.D.C. 2016). However, *Conservation Force* is distinguishable because the court in that case did not require defendant to release any documents, unlike this Court's Order. The court in *Conservation Force* instead permitted the defendants "to choose between releasing the content allegedly protected by the insufficiently explained exemptions *or* submitting 'a supplemental Vaughn Index and/or affidavits or declarations that comply with their obligations under [FOIA].'" *Id.* at 204 (emphasis added). The court noted that the defendants "would not have violated the [c]ourt's order if they had refused to produce any documents at all." *Id.* Here, however, Defendant was required to produce the non-exempt documents it represented it would produce by a date certain before the filing of the Motions for Summary Judgment. *See Edmonds v. F.B.I.*, 417 F.3d 1319, 1323, 1326 (D.C. Cir. 2005) (holding that an order requiring the FBI "to

turn over *all nonexempt documents* by a date certain," along with an order requiring expedited processing of the plaintiff's request, rendered the plaintiff a prevailing party eligible for attorney's fees under FOIA) (emphasis added). And Defendant could have been subject to sanctions or contempt if it failed to obey a court order. Accordingly, Plaintiff "substantially prevailed" by securing a Court Order requiring USCIS to disclose documents by a date certain, and thus Plaintiff is eligible to receive attorney's fees and costs.

As this Court finds that Plaintiff substantially prevailed by securing a Court Order, the Court need not address Plaintiff's other basis for eligibility of fees and turns directly to whether Plaintiff is entitled to fees.

B. Entitlement to an Award of Attorney's Fees and Costs

Because Plaintiff is eligible for an award of fees and costs, the Court must now consider whether Plaintiff is entitled. "To determine whether a plaintiff is entitled to attorneys' fees, the district court must look to '(1) the benefit of the release to the public; (2) the commercial benefit of the release to the plaintiff; (3) the nature of the plaintiff's interest; and (4) the reasonableness of the agency's withholding.'" *Sartori v. U.S. Army*, 853 F. App'x 494, 495 (11th Cir. 2021).

1. The Benefit of the Release to the Public

Plaintiff argues that the first factor weighs in its favor because its FOIA requests, seeking information regarding the I-924 program, relate to the important national issue of immigration. Defendant argues that Plaintiff does not sufficiently describe how the information Plaintiff received in response to its FOIA requests benefitted the public.

In assessing the public benefit derived from the case, "[f]irst, there is the question of the potential public value of the information sought, and second, there is the very different question of the effect of the litigation for which fees are requested." *Jud. Watch, Inc. v. U.S. Dep't of Just.*, 878 F. Supp. 2d 225, 234 (D.D.C. 2012); *Davy*, 550 F.3d at 1159 ("The first factor assesses 'the

public benefit derived from the case,' and requires consideration of both the effect of the litigation for which fees are requested and the potential public value of the information sought.") (citations omitted).

Regarding this first question, "[c]ourts have found public benefits in FOIA requests relating to matters of clear national import." *Scott v. Internal Revenue Serv.*, No. 18-CV-81750, 2021 WL 2882014, at *5 (S.D. Fla. July 9, 2021). "[A] bare allegation that a request bears a nexus to a matter of public concern does not automatically mean that a public benefit is present. To have 'potential public value,' the request must have at least a modest probability of generating useful new information about a matter of public concern. The higher this probability and the more valuable the new information that could be generated, the more potential public value a request has." *Morley v. C.I.A.*, 810 F.3d 841, 844 (D.C. Cir. 2016) (citations omitted). "This factor requires the Court to consider whether 'the [plaintiff's] victory is likely to add to the fund of information that citizens may use in making vital political choices.'" *Edelman v. Sec. & Exch. Comm'n*, 356 F. Supp. 3d 97, 105 (D.D.C. 2019). To assess the public benefit derived from the case, the Court conducts "an *ex ante* assessment of the potential public value of the information requested, with little or no regard to whether any documents supplied prove to advance the public interest." *Abtew v. U.S. Dep't of Homeland Sec.*, No. CV 13-1566 (ABJ), 2016 WL 11897241, at *4 (D.D.C. Mar. 31, 2016).

Plaintiff sought in its FOIA requests information regarding the I-924 program, which is an immigrant investor program that was discontinued on June 30, 2021. Plaintiff sought information regarding the pending petitions at the time the program was discontinued because Plaintiff believed a number of petitions still remained unadjudicated and USCIS had not refunded the application fees, which Plaintiff suggests can range from approximately $6,000 to $17,000 per application. Plaintiff represents that, with its longstanding advocacy for immigrants, Plaintiff submitted its

FOIA requests to obtain information to assist applicants who had been harmed by USCIS not processing their application or not refunding their application fee. To that end, Plaintiff requested: (1) the number of I-924 petitions pending when the program was discontinued, on June 30, 2021; (2) the date when each petition pending on June 30, 2021 was filed; (3) memos, comments to regulations, policy considerations, and policy memoranda drafted for the purpose of establishing I-924 fees; (4) the entire adjudications process for I-924 petitions from receipt at USCIS through adjudication and decision; (5) posted processing times for I-924 petitions from 2000 through the present; and (6) the total fees collected on all filed but unadjudicated I-924 petitions. Plaintiff received productions responsive to these requests on March 1, 2023 and April 25, 2023. Plaintiff represents it received "an unredacted Microsoft Excel spreadsheet" that "summarized the pending I-924 applications and the associated filing fees (which totaled nearly $1.3 million)." (ECF No. 14 at 4). Plaintiff asserts that this release of information created a public benefit because the disclosure relates to immigration, and immigration "is a hot-button, newsworthy issue." (ECF No. 19 at 7).

A plaintiff's bare allegation that its request bears a nexus to a matter of public concern, such as immigration, does not "automatically mean that a public benefit was present." *Morley*, 810 F.3d at 844. Plaintiff cites to *American Immigration Council v. United States Department of Homeland Security* in support of its contention that its FOIA request, relating to immigration, concerns matters of public import. 82 F. Supp. 3d 396 (D.D.C. 2015). In *American Immigration Council*, the plaintiff "sought information on 'policies regarding a noncitizen's access to counsel in interactions with [U.S. Customs and Border Protection and U.S. Department of Homeland Security]." *Id.* at 406. The court noted that "[i]mmigration policy—including treatment of noncitizens seeking entry to this country—has long been at the forefront of the national conversation." *Id.* The court further noted that the plaintiff additionally summarized the

documents it received and then posted them on its website; "[s]uch widespread dissemination of the fruits of the request cement[ed] a public-benefit finding." *Id.* at 407. Plaintiff has not made a similar showing here.

Instead, Plaintiff asserts that, after the initiation of this lawsuit, USCIS has started offering I-924 applicants the choice of either refunding their filing fee or adjudication of their application. Plaintiff argues that the timing of USCIS's decision to either refund or adjudicate pending I-924 petitions demonstrates that the decision was a direct result of this lawsuit and Plaintiff's FOIA requests. Plaintiff contends that USCIS's change in policy created a public benefit. As Plaintiff notes in its Reply, Defendant does not rebut the assertion that this litigation caused a change in USCIS's policy. However, in assessing the public benefit derived from the case, the Court conducts "an *ex ante* assessment of the potential public value of the information requested, with little or no regard to whether any documents supplied prove to advance the public interest." *Abtew*, 2016 WL 11897241, at *4; *Morley*, 810 F.3d at 844 (noting that it could "imagine a rare case where the research harvest seemed to vindicate an otherwise quite implausible request."). Rather, the public benefit factor weighs in a plaintiff's favor "where the [plaintiff's] victory is likely to add to the *fund of information* that citizens may use in making vital political choices." *Fenster v. Brown*, 617 F.2d 740, 744 (D.C. Cir. 1979) (quoting *Blue v. Bureau of Prisons*, 570 F.2d 529, 534 (5th Cir. 1978)) (emphasis added). Plaintiff's argument here hinges on USCIS's actions and how USCIS responded to the instant lawsuit, instead of the required showing of how Plaintiff's FOIA requests added to the fund of information that citizens may use in making vital political choices. USCIS's change in policy bears little or no weight on the inquiry of whether Plaintiff's FOIA requests added to information available to the public. As such, Plaintiff's assertion that its requests in fact advanced the public interest by causing USCIS's change in policy is afforded little or no weight, even if unrebutted.

Plaintiff argues that a clear public benefit is also shown by ensuring Defendant's timely and proper compliance with its obligations. "[T]he successful FOIA plaintiff always acts in some degree for the benefit of the public, both by bringing government into compliance with the FOIA disclosure policy and by securing for the public at large 'the benefits assumed to flow from the public disclosure of government information.'" *Scott*, 2021 WL 2882012, at *3 (quoting *Blue*, 570 F.2d at 533). However, "the simple disclosure of government documents does not satisfy the public interest factor." *Am. Immigr. Council*, 82 F. Supp. 3d at 406 (alterations and citations omitted). Plaintiff's argument that a public benefit is conferred by Defendant's timely compliance with its obligations does not demonstrate how Plaintiff's requests added to the fund of information available to the public. *See Spivey Util. Constr. Co. v. Occupational Safety & Health Admin., a division of U.S. Dep't of Lab.*, No. 8:16-CV-3123-T-36AEP, 2018 WL 4212005, at *7 (M.D. Fla. Aug. 14, 2018), *report and recommendation adopted sub nom. Spivey Util. Constr. Co. v. Occupational Safety & Health Admin.*, No. 8:16-CV-3123-T-36AEP, 2018 WL 4207997 (M.D. Fla. Sept. 4, 2018) ("Instead, [plaintiff] contends that it satisfies the public-benefit factor in this instance because [defendant] failed to timely and diligently comply with its FOIA obligations and improperly withheld documents that should have been produced to [plaintiff] in response to its FOIA request. . . . [T]hough the release of any government record benefits the public by increasing the public's knowledge of its government, Congress did not have this broadly defined benefit in mind when it authorized an award of attorneys' fees for a party who substantially prevailed.").

The second aspect of the public benefit inquiry—the effect of the litigation for which fees are requested—asks "whether the litigation has caused the release of requested documents, without which the requester cannot be said to have substantially prevailed." *Morley*, 810 F.3d at 844. This aspect of the public benefit inquiry "is a variation on the earlier question of whether a plaintiff has 'substantially prevailed,'" a burden that Plaintiff has already met. *Webster v. U.S. Dep't of Just.*,

No. CV 02-603 (RC), 2021 WL 4243414, at *5 (D.D.C. Sept. 17, 2021) (citations omitted). Accordingly, in consideration of the above, the public benefit factor weighs slightly in Plaintiff's favor.

2. The Commercial Benefit of the Release and the Nature of Plaintiff's Interest

Factors two and three—the commercial benefit to Plaintiff and Plaintiff's interest in the requested information—are often combined into a single factor. *Scott*, 2021 WL 2882014, at *6.

Plaintiff asserts that the purpose of Plaintiff's FOIA request was to obtain information to benefit I-924 applicants whose petitions USCIS still had in its possession. Defendant asserts that Plaintiff is an immigration law firm who wanted to assist I-924 applicants in suing USCIS for the application fees. Defendant asserts that such private interest in pursuing Plaintiff's FOIA request should foreclose entitlement to an award of fees.

The second and third factors assess "whether a plaintiff 'has sufficient private incentive to seek disclosure' of the document without expecting to be compensated for it." *McKinley v. Fed. Hous. Fin. Agency*, 739 F.3d 707, 711 (D.C. Cir. 2014). "Congress enacted FOIA to provide information to the public, not to benefit private litigants, so, where a party is motivated by self-interest or seeks to advance its private commercial interests, an award of fees is generally inappropriate." *Spivey Util. Constr. Co.*, 2018 WL 4212005, at *7.

Plaintiff is a law firm that specializes in immigration matters. Plaintiff contends it intended to use the information regarding the I-924 program to assist applicants in obtaining relief, such as "seeking refunds of those application fees, requesting that USCIS proceed with processing the timely I-924 applications and/or assisting applicants with re-applying through the channels that replaced the I-924 program." (ECF No. 14 at 3). Plaintiff asserts that it did not have nor did any of its clients have I-924 petitions pending at the time the I-924 program was discontinued.

Here, Plaintiff's commercial benefit of the release would be the possible enhancement of its immigration law practice. *See Ray v. U.S. Dep't of Just., I.N.S.*, 716 F. Supp. 1449, 1451 (S.D. Fla. 1989). However, the nature of Plaintiff's interest in the documents requested does not appear to be primarily personal. Plaintiff asserts that it is motivated by its desire to assist I-924 program applicants in obtaining relief. And it is unrebutted that Plaintiff and its clients did not have any pending I-924 petitions at the time the I-924 program was discontinued. Accordingly, the second and third factors do not persuade the Court one way or the other that attorney's fees and costs should be awarded.

3. The Reasonableness of the Agency's Withholding

The final factor in determining if Plaintiff is entitled to an award of fees is the reasonableness of the agency's withholdings. *McKinley*, 739 F.3d at 711. "To determine the reasonableness of an agency's withholding, a court must consider whether the agency's opposition to disclosure 'had a reasonable basis in law' and whether the agency was 'recalcitrant in its opposition to a valid claim or otherwise engaged in obdurate behavior.'" *Siegelman v. United States Dep't of Just.*, No. 2:16-CV-00083-MHH, 2019 WL 1513979, at *7 (N.D. Ala. Apr. 8, 2019). The agency carries the burden of showing that it behaved reasonably. *Id.*

Defendant never presented a lawful reason for withholding Plaintiff's requested documents. In fact, Defendant never even explicitly withheld Plaintiff's requested documents. Instead, Defendant asserts that a backlog of other FOIA requests, its limited resources, and the breadth of Plaintiff's requests prevented it from processing Plaintiff's FOIA request in a timely manner.

On May 11, 2022, Plaintiff submitted a FOIA request seeking documents relating to the I-924 petitions. Plaintiff's request sought six categories of information. That same day USCIS acknowledged receipt of the request, and requested Plaintiff to clarify certain requests. Plaintiff

provided the requested clarification eight days later. Defendant then notified Plaintiff that its goal was to respond within 20 business days of receipt of the request, further noting that FOIA permits a 10-day extension in certain circumstances. Defendant also notified Plaintiff that its request had been placed in the simple track, Track 1. Plaintiff did not receive Defendant's production until after the filing of this suit on March 1, 2023, producing 616 pages of information, and April 25, 2023, producing 364 pages of information.

Regarding Defendant's administrative backlog and limited resources, "the fourth factor is meant to 'incentivize the government to promptly turn over—before litigation is required—any documents that it ought not withhold.'" *Reyes v. United States Nat'l Archives & Recs. Admin.*, 356 F. Supp. 3d 155, 168 (D.D.C. 2018). "[T]his purpose would not be served if it were reasonable for agencies to withhold documents for indeterminant periods of time because they have too many FOIA requests and too few FOIA staff members." *Id.* Accordingly, Defendant's "failure to produce documents due to backlog or administrative issues does not constitute a reasonable basis in law." *ACLU v. U.S. Dep't of Homeland Sec.*, 810 F. Supp. 2d 267, 277 (D.D.C. 2011).

Defendant's assertion that Plaintiff's request was overly broad is unavailing as it was Defendant who placed Plaintiff's request on the simple track—a contention that Defendant does not rebut in its Response to the instant Motion. Accordingly, the undersigned finds this factor weighs in favor of Plaintiff.

* * *

None of the four entitlement factors "is dispositive." *Davy*, 550 F.3d at 1159. Here, the first factor and fourth factor favor Plaintiff, the second and third factors are neutral. On balance, then, Plaintiff has demonstrated an entitlement to an award for attorney's fees and costs.

III. RECOMMENDATIONS

Based on the foregoing, the undersigned respectfully **RECOMMENDS** that Plaintiff's Motion for Award of Attorneys' Fees and Costs (ECF No. 14) be **GRANTED**, and that Plaintiff be found eligible and entitled to an award of fees and costs.

A party shall serve and file written objections, if any, to this Report and Recommendations with the Honorable K. Michael Moore, United States District Judge for the Southern District of Florida, within **FOURTEEN (14) DAYS** of being served with a copy of this Report and Recommendations. Failure to timely file objections will bar a *de novo* determination by the District Judge of anything in this recommendation and shall constitute a waiver of a party's "right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions." 11th Cir. R. 3-1 (2016); 28 U.S.C. § 636(b)(1)(C); *see also Harrigan v. Metro-Dade Police Dep't Station #4*, 977 F.3d 1185, 1191–92 (11th Cir. 2020).

RESPECTFULLY SUBMITTED in Chambers at Miami, Florida this 13th day of February, 2024.

LAUREN F. LOUIS
UNITED STATES MAGISTRATE JUDGE

cc: Honorable K. Michael Moore
All Counsel of Record