UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GOVERNMENT ACCOUNTABILITY & OVERSIGHT, *Plaintiff*, v. UNITED STATES DEPARTMENT OF ENERGY, *Defendant*.	Civil Action No. 24-1829 (RDM)

PLAINTIFF'S REPLY IN FURTHER SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS AND OPPOSITION TO MOTION TO DISMISS

NOW COMES Government Accountability & Oversight ("Plaintiff"), by and through its undersigned counsel, and files this unified Reply in Further Support of its Motion for Judgment on the Pleadings and Opposition to the Government's Motion to Dismiss.

I. Introduction

The Government has sought at every opportunity to postpone the date that the Plaintiff will have an opportunity to view records at issue here, which are responsive to a two-part request made in early June 2024 on an expedited basis. The Government's initial objective plainly was to postpone release of details until after the information was of its greatest use, i.e., before the upcoming elections. Those records sought were *both* those meeting a certain description and sent to the Department of Energy's Headquarters by the National Energy Technology Laboratory ("NETL"), a U.S. national laboratory under the Department of Energy Office of Fossil Energy, and, separately, all emails transmitting any records meeting that description. ECF No. 1-1 at 1.

The existence of any number of records greater than zero thoroughly undermines the claimed rationale behind a highly controversial action by the Government that a sister district court has already determined was unlawful and has enjoined. ECF No. 22 at 8. The details contained in those records remain critical and the efforts to delay and thereby deny timely release continue. In ECF No. 13, the Government did belatedly acknowledge records exist, which the Government affirmed before this Court at an October 1, 2024 hearing, only to reverse this admission in a recent letter following embarrassing national media coverage. However, the Government did so in a fashion that gives away its game.

The Government began by refusing to issue a determination with respect to Plaintiff's request for expedited processing, effectively ignoring that request. ECF No. 10 at 6. Only when Plaintiff's counsel specifically pressed the Government's lawyers to provide the long-overdue statutorily required assertion of the number of potentially responsive records did the Government finally admit that it possessed approximately 97 records, adding up to 4,354 pages. ECF No. 13 at ¶¶ 2(c), ¶ 8. The Government reiterated this position at an October 1 hearing in this matter, again stating that it possessed 97 responsive records but giving the total page count as approximately 4,500 pages. ECF No. 20 at 9:1-9.

Then, long after the timeframe for issuing a "determination" with respect to Plaintiff's FOIA request had elapsed, and even after Plaintiff had filed a Motion for Judgment on the Pleadings (and after the Defendant successfully obtained a temporary stay of its own litigation deadlines), the Government crafted a new narrative, issued in a letter engineered to support its argument subsequently filed with this Court that this suit should be dismissed as moot. As the Government now tells it—upon reconsidering what it believes Plaintiff really sought and by inserting, *in October*, limiting terms found nowhere in Plaintiff's actual June 7, 2024 request—

there are no records responsive to Plaintiff's request at all. ECF No. 22-4. What changed between the Government's assertions in this Court at ECF No. 13 (September 13, 2024), the October 1, 2024 hearing, and Defendant's (October 18, 2024) letter and subsequent Motion to Dismiss? Only the Government's creative interpretation or "understanding" of Plaintiff's request. ECF No. 22-4; see also discussion, *infra*. But the Government's newfound understanding of Plaintiff's request was not reached in consultation with the Plaintiff. Instead, this new position is borne of the Government's unilateral convenience which had evolved over weeks to match its litigation strategy: indeed Plaintiff's counsel expressly objected by email to that interpretation as soon as Plaintiff received the Government's October 18, 2024 letter. Exhibit A.

The Government's newfound arguments – created solely to support its attempts to dismiss this case on mootness grounds – are so specious that they border on bad faith. After ignoring Plaintiff's request, followed by procedural maneuvering postponing its obligation to respond to the Plaintiff in this Court, the Government serially delayed any response to Plaintiff's request, then provided a "final response" to a request Plaintiff never submitted, rewriting the scope of records at issue in an attempt to avoid further political embarrassment and in order to assist pleadings then being drafted. The Government is judicially estopped from changing its position at this late stage of the litigation and in order to engineer a dismissal on mootness grounds.

II. Standard of Review

The Government seeks to forestall relief in favor of the Plaintiff on two separate grounds, each of which is governed by a separate standard. Plaintiff addresses each separately in turn:

a) Motion for Judgment on the Pleadings

A motion for judgment on the pleadings "is designed to dispose of cases where the material facts are not in dispute and a judgment on the merits can be rendered by looking at the

substance of the pleadings and any judicially noted facts." *All. of Artists & Recording Cos. v. GM Co*., 162 F. Supp. 3d 8, 16 (D.D.C. 2016), citing and quoting *Hebert Abstract Co. v. Touchstone Properties, Ltd*., 914 F.2d 74, 76 (5th Cir. 1990). A motion for judgment on the pleadings "only has utility when all material allegations of fact are admitted or not controverted in the pleadings and only questions of law remain to be decided[.]" *All. of Artists & Recording Cos.*, 162 F. Supp. 3d at 16, quoting 5C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1367 at 208 (3d ed. 2004). "The moving party must show that no material issue of fact remains to be solved and that it is entitled to judgment as a matter of law." *Judicial Watch, Inc. v. U.S. Dep't of Energy*, 888 F. Supp. 2d 189, 191 (D.D.C. 2012).

b) Motion for Dismissal on Mootness Grounds

A FOIA case becomes moot on its merits when all documents have been received. *Perry v. Block*, 684 F.2d 121, 125 (D.C. Cir. 1982) ("Once the records are produced the substance of the controversy disappears and becomes moot since the disclosure which the suit seeks has already been made."). FOIA provides that the "district court of the United States shall not have jurisdiction to review an agency denial of expedited processing of a request for records after the agency has provided a *complete* response to the request." 5 U.S.C. § 552(a)(6)(E)(iv) (*emphasis added*).

III. Argument

First, this Court should reject the Government's efforts to rewrite the Plaintiff's FOIA request and also the history of this litigation, and should hold the Government to its earlier litigation position that 97 responsive records exist under the doctrine of judicial estoppel, which is to say hold the Government to processing the request *as submitted* not as unilaterally reinterpreted to fit the Government's litigation strategy. On the proper record which the Government

acknowledged as recently as October 1, 2024, the Court should grant judgment on the pleadings because Plaintiff is lawfully entitled to expedited processing and because there are no disputed facts on that issue. The Court should also grant judgment on the pleadings because the Government cannot re-write Plaintiff's request in an effort to moot Plaintiff's right to relief on the merits of its request for such expedition, while simultaneously purporting to have provided a "complete" response to that request within the meaning of 5 U.S.C. § 552(a)(6)(E)(iv).

a) The Government is judicially estopped from changing its position in this case.

As a preliminary matter, this Court should reject the Government's clumsily manufactured position that this case is moot, grounded in a self-serving reinterpretation of the request's plain language manifestly arrived upon to strategically support pleadings, because the Government is judicially estopped from arguing that it has no responsive records after it twice represented to this court that it had 97 responsive records totaling over four thousand pages. The Government cannot maintain contradictory positions in this Court absent a showing of new information or some other good faith basis for its new position because it is barred from doing so by the doctrine of judicial estoppel. Here, the only thing that has changed between the Government's initial assertions that 97 records exist and its new assertion that zero records exist is a unilateral alteration of the terms of the request at issue in service of the Government's desire to obtain a dismissal of this suit.

"Judicial estoppel operates to prevent a party from insulting a court through improper use of judicial machinery." *Konstantinidis v. Chen*, 626 F.2d 933, 938 (D.C. Cir. 1980) "Where a party assumes a certain position in a legal proceeding, . . . succeeds in maintaining that position, . . . [and then,] simply because his interests have changed, assume[s] a contrary position," judicial estoppel prevents the party from maintaining its second, contradictory position. *Comcast Corp. v. FCC*, 390 U.S. App. D.C. 111, 116, 600 F.3d 642, 647 (2010), citing and quoting *New Hampshire v. Maine*,

532 U.S. 742, 749, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001) (internal quotation marks omitted). As this Court has previously held, "[a]pplication of the doctrine of judicial estoppel should be guided by a sense of fairness, with the facts of the particular dispute in mind." *Encyclopaedia Britannica, Inc. v. Dickstein Shapiro, LLP*, 905 F. Supp. 2d 150, 154 (D.D.C. 2012), citing and quoting 18 Moore's Federal Practice § 134.31 (3d ed. 2012).

It is difficult to imagine a greater insult to the judicial process than what DoE has done in this case: First, it delayed the process, successfully convincing this Court to issue a temporary stay even after DoE had failed to follow its own regulations and had effectively ignored a request for expedited processing. Then, DoE belatedly represented to this Court on October 1, 2024 that Plaintiff was effectively seeking to force the processing of over four thousand pages of responsive records on the eve of an election, and that DoE was already engaged in an extensive "consultation process" as to those 4,500 pages of documents. ECF No. 20 at 9:8-12. But only on October 18, 2022 – after DoE was facing an imminent deadline to respond to Plaintiff's Motion for Judgment on the Pleadings and defend its unlawful behavior, did DoE suddenly reconsider and purport to issue a "final determination" that no records at all exist that are responsive to Plaintiff's request. ECF No. 22-4. This Court should disregard DoE's gamesmanship and its creative last-minute reinterpretation of Plaintiff's FOIA request, and hold DoE to its earlier position that 97 responsive records exist and otherwise to the request's plain language as submitted by Plaintiff.

b) Plaintiff is entitled to expedited processing

There are no material facts in dispute which could lead this Court to deny Plaintiff's entitlement to expedited processing.

First, as Plaintiff pointed out in its motion, DoE has admitted all relevant facts. ECF No.

10 at 7[1] (DoE's admission that it failed to provide determination with respect to Plaintiff's request); ECF No. 10 at 10 (DoE does not deny that a true and correct copy of Plaintiff's request for expedited processing was attached to Plaintiff's request).[2] To the extent this Court chooses to look outside the pleadings, this Court also has the power to consider "matters of which the court may take judicial notice… and matters of public record…" *Egilman v. Keller & Heckman, LLP*, 401 F. Supp. 2d 105, 109 (D.D.C. 2005). Matters of public record susceptible to judicial notice include news articles. *Reporters Comm. for Freedom of the Press v. FBI*, 369 F. Supp. 3d 212, 215 n.2 (D.D.C. 2019), citing *Sandza v. Barclays Bank PLC*, 151 F. Supp. 3d 94, 113 (D.D.C. 2015) (taking judicial notice of existence of news articles); *Washington Post v. Robinson*, 935 F.2d 282, 291, 290 U.S. App. D.C. 116 (D.C. Cir. 1991) ("court[s] may take judicial notice of the existence of newspaper articles…"). Because DoE ignored Plaintiff's request for expedited processing rather than completing the administrative record, and because the Complaint and judicially noticeable facts make plain that Plaintiff demonstrated its entitlement to expedited processing and showed intense interest in the sort of information its FOIA request is calculated to reveal, this Court should grant judgment on the pleadings.

But to the extent that this Court wishes to consider Defendant's arguments at all, Defendant actually bolsters the Plaintiff's showing of public interest in the LNG pause: Defendant admits that it has been preliminarily enjoined from pursuing its "LNG pause," the claimed basis for which the records at issue here directly pertain to, but paradoxically argues that there is no current exigency in obtaining information regarding that pause. ECF No. 22 at 18. Yet preliminary injunctive relief

[1] All citations to other filings in this case cite to the pagination of the ECF document, and not to the internal pagination of any document, for ease of reference and consistency.
[2] A Court may take judicial notice of exhibits to the complaint "without converting the motion to one for summary judgment." *Real World Media LLC v. Daily Caller, Inc.*, Civil Action No. 23-1654 (JDB), 2024 U.S. Dist. LEXIS 145045, at *8 (D.D.C. Aug. 14, 2024).

can only be granted when there is both the sort of exigency that the DoE denies exists here. *Winter v. Natural Resources Defense Council*, 55 U.S. 7, 22 (2008) (for the proposition that a preliminary injunction is a form of extraordinary relief). To the extent that the Defendant argues that there is no exigency, or that the exigency is abated due to a sister court's preliminary injunction against DoE, DoE's argument is undermined by its admission that its "LNG pause" has been preliminarily enjoined. ECF No. 22 at 18 (expressing incredulity that Plaintiff argues a "recognized interest is still impacted despite the injunction"). And the DoE even admits that it has appealed the Middle District of Louisiana's injunction, such that the "LNG pause" could conceivably come back into effect at a moment's notice if DoE gets its way. ECF No. 22 at 8, citing *Louisiana v. Biden*, No. 24-30489 (5th Cir.). This also undermines DoE's arguments that there is no exigency to the Plaintiff's request.

The Plaintiff did what it was required to do under the law to demonstrate entitlement to expedited processing. The DoE ignored Plaintiff's request rather than building an administrative record supporting denial of that request. Now, DoE in Court only adds more fuel to the fire of public interest in the LNG pause. This Court should hold that Plaintiff is entitled to expedited processing of its request.

c) Plaintiff's request is not moot.

The Government has not issued a "complete" response to Plaintiff's FOIA request within the meaning of 5 U.S.C. § 552(a)(6)(E)(iv); instead, it has rewritten Plaintiff's request so as to manufacture a claim of mootness. Because of the Government's last-minute change in position, this is not a case in which the Government has issued an untimely and unlawful determination which the parties can properly challenge on its merits; instead, this is a case in which the Government has reversed itself in this Court by issuing a purported "determination" which has no

bearing at all on the two-part request Plaintiff actually submitted. And because the Plaintiff's actual request remains to be processed, and responded to, the Plaintiff continues to seek expedited processing for its request regardless of what the Government might have done with respect to its invented request.

Specifically, Plaintiff requested (bold and italics in original):

> "**copies of 1) any LNG export study transmitted by the National Energy Technology Lab to the Office of Fossil Energy *between January 1, 2023 and October 31, 2023*, and 2) the email(s) transmitting the document(s) from NETL to, *inter alia*, [Office of Fossil Energy].**"

ECF 1-1. See also, e.g., ECF 12-1, Morris Declaration, at ¶ 7; ECF No. 22-4.

Plaintiff *did not* limit its request for "*any* LNG export study transmitted by the National Energy Technology Lab" during that period to, e.g., "any final" report or "any report ready for release for the public's view" (*infra*). There can be no argument that Plaintiff did not so limit its request, but that Defendant did so on its own initiative (and without consulting Plaintiff), when it, for the first time, reimagined Plaintiff's request in an October 18, 2024 "final response" as follows:

> "DOE understands your request to only be seeking a final LNG export study like those noted in Footnote 1 of your request and ready for release for the public's view. DOE did not find a final LNG export study in its search."

ECF No. 22-4 at 1.

That is not the request Plaintiff submitted. It is not the response Defendant conducted its search for as described in ECF No. 13 nor is it the request whose search results were further elaborated on to this Court in the October 1 hearing.[3] Neither is it the request for which Plaintiff

[3] Defendant acknowledges therein if without any further explanation that it conducted its July

seeks a judicial determination from this Court that it is entitled to expedited processing. It is a request of Defendant's own invention, at the last hour, concocted in order to support a dismissal of this action and contradicting the Defendant's own repeated statements to this Court about the number and nature of responsive records. The reinterpretation announced in the October 18, 2024 letter and the letter itself is a yet another "tell" that responsive records exist, as DoE previously admitted in this Court, and that it took a rewrite of Plaintiff's description of records sought to wand away the prior, detailed admission. Whatever the Defendant's creative "final response" might be, it is certainly not "complete" within the meaning of 5 U.S.C. § 552(a)(6)(E)(iv), and this Court has the full power and jurisdiction to review it.

The Government, in very short, is attempting to be too clever by half. Defendant DoE changed its reading of the request for "*any* LNG export study transmitted by the National Energy Technology Lab to the Office of Fossil Energy between January 1, 2023 and October 31, 2023," to "any LNG export study transmitted by the National Energy Technology Lab to the Office of Fossil Energy between January 1, 2023 and October 31, 2023, *which was final or ready for public review*," for purposes of engineering this "no records" response just prior to filing this Motion to Dismiss. This Court should ignore the Government's gamesmanship.

IV. Conclusion

This Court should grant the Plaintiff's Motion for Judgment on the Pleadings, ECF No. 10,

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2024 search "using broader search terms" than some undescribed narrower terms used previously. The only detail offered is that the October 18, 2024 "final response" was grounded in adding the limiting parameters of "final" or "ready for release for the public's view." On the merits of the "final response," therefore, this warrants further exploration to discern if "broader" means without the limitations inserted by Defendant for its no records response which is the basis for its Motion to Dismiss, as seems apparent. *Ocasio v. DOJ*, 67 F. Supp. 3d 438, 440 (D.D.C. 2014), citing *Justice v. IRS*, 798 F. Supp. 2d 43, 47 (D.D.C. 2011) and *Voinche v. F.B.I.*, 412 F. Supp. 2d 60, 71 (D.D.C. 2006) (for the proposition that discovery is appropriate where a Plaintiff adequately alleges bad faith or where the adequacy of the agency's search is at issue).

and deny the Government's Motion to Dismiss. ECF No. 22.

Respectfully submitted this the 29th day of October, 2024,

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