

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**CITIZENS FOR RESPONSIBILITY)
AND ETHICS IN WASHINGTON,)**

Plaintiff,)

v.)

Civil Action No. 22-0457 (RDM)

**U.S. DEPARTMENT OF HOMELAND,)
SECURITY,)**

Defendant.)

**PLAINTIFF’S OPPOSITION TO DEFENDANT’S MOTION TO DISMISS OR,
IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

This case concerns a Freedom of Information Act (“FOIA”) request Plaintiff Citizens for Responsibility and Ethics in Washington (“CREW”) filed with the U.S. Department of Homeland Security (“DHS”) seeking documents concerning a discrete grant program created by DHS to counter violent extremism, the Center for Prevention Programs and Partnerships (“CP3”). CP3 and its two predecessor programs have been the subject of much criticism and two separate audits by the Government Accountability Office (“GAO”), which identified significant concerns with the government’s effectiveness at combatting violent extremists groups and the disproportionate impact on racial and religious communities that its efforts had. *See* Complaint (“Compl.”) ¶ 10.

CREW submitted its request to DHS on August 20, 2021, and filed this action after hearing nothing from the agency. DHS has now moved for summary judgment or, alternatively, to dismiss (“DHS SJM”) arguing CREW’s request fails to reasonably describe the requested records and CREW failed to exhaust administrative remedies. A fatal flaw lies at the heart of

DHS's motion, however: DHS never responded to CREW. Instead, it sent two communications to a private email address, ignoring CREW's request that it communicate to a specific CREW employee at a specified CREW email address. *See* Exhibits B and C to DHS SJM (Dkt. Nos. 7-2 and 7-3) ("Ex. B" and "Ex. C"). Accordingly, as a factual matter, DHS has not demonstrated that CREW failed to exhaust administrative remedies because the agency never advised CREW of those remedies or any deficiency in its request.

Further, had DHS followed this Court's rules, which require all parties seeking to move for summary judgment to first request a pre-motion conference from the Court and in FOIA cases require the agency prior to such a conference to provide the requester with search declarations, DHS would have learned of its failure to properly communicate its concerns to CREW. *See* Standing Order in Civil Cases, ¶¶ 10(a) and (b) (Dkt. 4). Its failure to do so has wasted the resources of the Court and the parties and alone provides a basis to deny DHS's motion.

BACKGROUND

To counter the violent extremism that has plagued the United States for decades DHS created Countering Violent Extremism ("CVE"), a grant program designed to prevent extremism and enhance national security. Despite its facially neutral goal, the CVE program generated concerns about its effectiveness and disproportionate impact on racial and religious communities. *See, e.g.*, Betsy Woodruff Swan, DHS stands up domestic terror intelligence team, *Politico*, May 11, 2021, <https://www.politico.com/news/2021/05/11/dhs-domestic-terror-intelligence-487145>; Faiza Patel, Ending the 'National Security' Excuse for Racial and Religious Profiling, *Brennan Center for Justice*, July 22, 2021, <https://www.brennancenter.org/our-work/analysis-opinion/ending-national-security-excuse-racial-and-religious-profiling>.

In 2017, GAO conducted an audit to evaluate CVE's effectiveness. *See* Gov't Accountability Off., GAO-17-300, Countering Violent Extremism: Actions Needed to Define Strategy and Assess Progress of Federal Efforts, April 2017, <https://www.gao.gov/assets/gao-17-300.pdf> ("2017 GAO Report"). GAO concluded that because the government had not established a "cohesive strategy with measurable outcomes . . . to guide the multi-agency CVE effort towards its goals" GAO "could not determine the extent to which the United States is better off today as a result of its CVE effort than it was in 2011." 2017 GAO Report at 16.

CVE was subsequently updated and re-named the Targeted Violence and Terrorism Prevention Program ("TVTP"). Like CVE, TVTP's stated goal was to "provide funding for state, local, tribal, and territorial governments, nonprofits, and institutions of higher education . . . to establish or enhance capabilities to prevent targeted violence and terrorism." U.S. Dep't of Homeland Security, Targeted Violence and Terrorism Prevention Grant Program, <https://www.dhs.gov/tvtpgrants>. And like CVE, TVTP was criticized for employing the same discriminatory approach to domestic terrorism. *See, e.g.*, Harsha Panduranga, Community Investment, Not Criminalization, *Brennan Center for Justice*, June 17, 2021, <https://www.brennancenter.org/our-work/research-reports/community-investment-not-criminalization> ("2021 Brennan Center Report").

In July 2021, GAO issued a second report that evaluated the TVTP program. Gov't Accountability Off., GAO-21-507, Countering Violent Extremism: DHS Can Further Enhance Its Strategic Planning and Data Governance Efforts, July 2021, <https://www.gao.gov/assets/gao-21-507.pdf>. GAO found that the TVTP lacked key elements "of a comprehensive strategy" necessary to achieve its goals, such as needed "resources and investments" and external factors[.]" *Id.* at 18-19. Other missing elements included "fully established data governance

leadership and policies associated with targeted violence and terrorism prevention”; “an inventory of targeted violence and terrorism prevention-related data assets”; and “opportunities to increase staff and data skills.” *Id.* at 24. GAO further noted that DHS did not even have “a department-wide definition of targeted violence.” *Id.* at 19.

Recognizing the flaws in TVTP, the Biden administration rebranded DHS’s violence prevention activities as the Center for Prevention Programs and Partnerships (“CP3”), which DHS launched on May 11, 2021. U.S. Dep’t of Homeland Security, DHS Creates New Center for Prevention Programs and Partnerships and Additional Efforts to Comprehensively Combat Domestic Violent Extremism, Press Release, May 11, 2021, <https://www.dhs.gov/news/2021/05/11/dhs-creates-new-center-prevention-programs-and-partnerships-and-additional-efforts>.

CP3 has been criticized as simply representing an old approach with a new name. 2021 Brennan Center Report at 3. Specifically, “much of CP3’s prevention activities rest on the empirically disproven premise that there are identifiable markers that can predict who is going to commit an act of violence[.]” *Id.* While CP3 has broadened the focus from Muslims “to a wider spectrum of political violence,” that expansion also “expands the reach of the ineffective and discriminatory CVE model.” *Id.* Moreover, DHS’s model “ignore[s] the reality of structural racism” and uses “markers of potential violence” that “are so vague as to open the door to bias[.]” *Id.*

The FOIA Request At Issue

By letter dated August 20, 2021, and submitted through the online portal on that date, CREW made a FOIA request to DHS seeking seven categories of records concerning CP3 from January 1, 2021 to the present. Specifically, CREW requested:

- (1) All records and communications regarding the origins and creation of CP3, including but not limited to funding and priorities for the Center;

- (2) Documents sufficient to identify all senior agency leadership involved in creating and running CP3;
- (3) All records and communications relating to CP3 regarding collaboration with, outreach to, or input from religious or community groups such as the Arab-American Anti-Discrimination Committee, and external entities or private sector partners including but not limited to, corporations, religious groups, technology companies, contractors, airports, civil society, academia, allies, and foreign partners;
- (4) All records and communications relating to CP3 regarding collaborations or partnerships with federal, state, local, tribal, or territorial law enforcement agencies;
- (5) All records and communications relating to the actual or potential impact of CP3 on any racial or religious communities, or individuals affiliated with particular ideologies;
- (6) All records and communications referencing the creation of or updates to a compilation of potential indicators of terrorism- or domestic terrorism-related mobilization, including iconography, symbology, phraseology, actions or other appearances, and previous or future Federal Government's Mobilization Indicators booklets; and
- (7) All records and communications created or received by CP3 staff and containing the keywords: "Countering Violent Extremism," "CVE," "Targeted Violence and Terrorism Prevention," "TVTP," "Muslim," "Islam," "Mosque," "Masjid," "Jihad," "White Supremacist," "Nationalist," "White Nationalist," "White Supremacy," "Black Lives Matter," "Riot," "Protests," "January 6th," "1/6," "Insurrection," "September 11th," "9/11," "Religion," "Equitable," "Bias," "Disparate impact," "Discriminatory," "Structural racism," "People of color," "Marginalization," "Equitable," "Race," "Racial," "Racist," "IG," or "Inspector General."¹

CREW sought a waiver of fees associated with processing its request. In support of its request for a fee waiver CREW explained that while CP3 has been marketed as an overhaul of TVTP and CVE, given its discriminatory history it is unclear if that will be true in practice. The requested records will provide a clearer picture for the American public of what has been included in the updated program and whether CP3 has made the necessary changes or instead still continues the same harmful practices of CVE and TVTP. *See* Exhibit A.

CREW's request was signed by Anna Selbrede, then a policy intern at CREW. *Id.* Ms. Selbrede specifically requested that any questions or problems concerning CREW's request be directed to Hajar Hammado at Ms. Hammado's CREW email address identified in the request.

¹ CREW's request is Exhibit A to DHS's SJM, Dkt. No. 7-1 ("Ex. A").

Id. By February 2, 2022, when CREW filed its complaint in this action CREW had heard nothing from DHS concerning its request. Compl. ¶ 21.

ARGUMENT

I. Because DHS Failed to Advise CREW of the Alleged Deficiencies In CREW’s Request and Failed to Provide CREW With Any Appeal Rights DHS’s Motion Must Be Denied.

The FOIA imposes on agencies an obligation to respond to a FOIA request within 20 business days. 5 U.S.C. § 552(a)(6)(A)(i) (2018). DHS’s implementing FOIA regulations provide that if an agency component determines that a request “does not reasonably describe the records sought, the component should inform the requester what additional information is needed or why the request is otherwise insufficient.” 6 C.F.R. § 5.3(b). Further, “[r]equests for clarification or more information *will* be made in writing (either via U.S. mail or by electronic mail[.]” *Id.* at § 5.3(c) (emphasis added).

Here, DHS claims that by letter dated October 6, 2021, and sent by email, it advised CREW that six of the seven categories of information CREW requested “are too broad in scope or did not specifically identify the records which you are seeking.” Ex. B. DHS did not, however, send this letter to the CREW email address provided in CREW’s FOIA request, but sent it instead to a private email address not accessible to CREW. On October 12, 2021, DHS sent another email requesting clarification for and narrowing of category seven of CREW’s request. The letter advised that DHS was placing the request “on hold until we receive clarification from you.” Ex. C. Once again, however, DHS failed to send the letter to the CREW email address identified in CREW’s request. As a result, CREW never received either communication. *See* Compl. ¶ 21.

It is axiomatic that a FOIA requester cannot be faulted for failing to respond to an agency communication that was never received because it was not properly directed to the requester. That is the precise situation here. DHS ignored CREW's proffered email address for communicating with CREW regarding any questions or concerns with CREW's request. It is equally manifest that without any notice CREW cannot be faulted for failing to exhaust any administrative remedy. *See, e.g., Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 65 (D.C. Cir. 1990) (requirement to exhaust triggered only if agency response includes, *inter alia*, "notice of the right of the requester to appeal."). On this basis alone DHS's motion must be denied.

II. DHS's Failure to Comply With This Court's Rules Concerning Summary Judgment Motions Requires That Its Motion Be Denied.

This Court's rules provide explicitly that before filing a summary judgment motion a party must first "request that the Court schedule a pre-motion conference," and that for FOIA cases "[t]he agency shall provide search declarations and *Vaughn* indices, if any, to the requester prior to seeking a pre-motion conference." Standing Order In Civil Cases, ¶¶ 10(a) and (b). Here DHS filed its summary judgment motion without seeking a pre-motion conference. The fatal flaw in its motion illustrates precisely why compliance with the Court's Standing Order is not only required but necessary. Had DHS first advised the Court and CREW of the basis for its motion it would have learned that CREW never received the required notice from DHS concerning the purported inadequacies of CREW's FOIA request because of misdirected communications by DHS. Yet it is CREW's failure to respond to DHS's notice that forms the fundamental premise for DHS's motion, a failure that lies not with CREW's fault but that of DHS.

Nor is this a mere formality. The FOIA and its exhaustion requirements clearly contemplate that both the agency and the requester will have an opportunity at the administrative

level to work out any issues with the request. Had CREW been given that opportunity here it could have provided DHS additional information to help the agency locate responsive records and learned from DHS why the agency believed the request as submitted did not reasonably describe the requested documents. Significantly in its misdirected letter of October 6, 2021, DHS claimed that six of the seven categories in CREW's request were "too broad" or failed to "specifically identify" the requested records but provided no further explanation for its overbreadth characterization. Had CREW been given an opportunity to respond to these allegations it could have probed which aspects of CREW's request raise these concerns and better understood how, if necessary, it could clarify or reframe the request.² But without such notice it had no opportunity to do so. Accordingly, because DHS failed to comply with this Court's Standing Order its motion should be denied.

CONCLUSION

None of the issues raised in DHS's motion are properly before the Court because the agency failed to raise them administratively with CREW. DHS also failed to comply with this Court's order concerning the filing of summary judgment motions; its compliance likely would have obviated, if not eliminated, the need for any motion on these issues. For all these reasons Plaintiff respectfully requests that the Court deny DHS's motion to dismiss or, in the alternative, motion for summary judgment.

Respectfully submitted,

/s/ Anne L. Weismann
Anne L. Weismann

² CREW does not, however, concede that its request did not reasonably describe the records it seeks. To the contrary, CREW's request concerns a discrete DHS program created less than a year ago, specifies seven specific categories of records, and provides specific search terms to be used. *See* Ex. A. But because of DHS's failure to communicate its concerns to CREW, this issue is not properly before the Court.

(D.C. Bar No. 298190)
5335 Wisconsin Avenue, N.W., Suite 640
Washington, D.C. 20015
Phone: 301-717-6610
Weismann.anne@gmail.com

Adam J. Rappaport
(D.C. Bar No. 479866)
Citizens for Responsibility and
Ethics in Washington
1331 F Street, N.W., Suite 900
Washington, D.C. 20004
Phone: (202) 408-5565
Facsimile: (202) 588-5020

Dated: April 20, 2022

Attorneys for Plaintiff