No. 22-5770

IN THE

Supreme Court of the United States

JULIAN OKEAYAINNEH,

Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF PRISONS, DIRECTOR/CHIEF of HUMAN RESOURCES,
UNITED STATES ATTORNEY GENERAL,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia

PETITION FOR A WRIT OF CERTIORARI

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September 26, 2022

QUESTIONS PRESENTED

The Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.*, provides public access to information held by public authorities.[1] The Act provides that public authorities are obligated to publish certain information about their activities, and members of the public are entitled to request that information from them.

Since the enactment of the FOIA and its processes, courts have been uniform in providing that "FOIA exemptions should be narrowly construed to favor disclosure." Cf. Hanson v. U.S. Agency for Intern. Development, 372 F.3d 286, 290 (4th Cir. 2004). In other words, information held by public authorities can only be withheld when it is "specifically exempted from disclosure by [another] statute" where the relevant statute either "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue" or where the relevant statute "establishes [a] particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3)(A)(i), (ii) (2013).

The situation at issue in this case focuses on whether the records provided to the Petitioner, Julian Okeayainneh, through the FOIA process sufficiently complied with the FOIA's disclosure requirements and, equally important, whether those records were in full compliance with the attestation requirement denoting the records' authenticity and reliability as set forth under 28 U.S.C. § 1746 and Rule 11(b) of the Federal Rules of Civil Procedure.

In 2019, Mr. Okeayainneh submitted three FOIA requests to various public authorities. The first two requests were submitted to the Bureau of Prisons ("BOP"), and the third was submitted to the Director of the Office of Information Policy ("OIP"). Each requests asked to be provided with "a copy of all records of information order adding restitution per amended judgment, updated on 09/04/2013 under Criminal No. 11-CR-87(1)," and "a copy of all records of information ordering restitution vacated received on 5/15/2017 under Criminal Case No. 11-CR-87(1)." In a response letter dated April 15, 2019, the BOP indicated that it had located 95 pages of responsive documents, of which 65 pages were appropriate for release. The BOP's April 15, 2019 response also indicated that 30 pages had to be withheld in their entirety. In other words, the BOP withheld a twenty-eight-page Statement of Reasons (SOR) in Criminal Case No. 11-CR-00087 under Exception 7(F), and a two-page May 10, 2017 Order in Criminal Case No. 11-CR-00087 under Exceptions 6 and 7(C).

Dissatisfied with the BOP's response, Mr. Okeayainneh appealed unsuccessfully to the OIP which upheld the BOP's determination. After exhausting

[1] *See generally* 5 U.S.C. § 552(a)(3)(A) (2013), which provides that, with certain exceptions, an "agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules ..., shall make the records promptly available to any person."

his administrative remedies, Mr. Okeayainneh, on November 14, 2019, initiated this FOIA civil action against the Department of Justice ("DOJ"), the BOP, the Chief Human Resource Officer at the BOP's Designation and Sentence Computation ("DSCC"), and the Attorney General of the United States (collectively, the "Department"), arguing that the Department "failed to respond to certain of his FOIA requests or properly assert any exemption under FOIA which would justify withholding the requested records." (*See* Appendix 42). While the litigation was underway, the BOP released a two-page May 10, 2017 Order in Criminal Case No. 11-CR-00087. (*See* Appendix 11). The BOP also allowed Mr. Okeayainneh to review a 28-page SOR with the prison's Unit Manager, James McCollough.

Thereafter, the Department moved to dismiss the FOIA litigation or, in the alternative, move for summary judgment on the grounds that it had fully complied with the FOIA process. Mr. Okeayainneh, in turn, filed objections, and the district court, in a Memorandum Opinion dated January 28, 2021, entered an Order dismissing all the named defendants other than the Department of Justice because it is the only proper defendant under the FOIA, and held that "[n]otwithstanding the conclusion that [the] BOP conducted reasonable searches, [the] BOP failed to demonstrate that it completely fulfilled its FOIA obligations" to Mr. Okeayainneh. (*See* Appendix 17). In sum, the district court found that the declaration provided by the Department in support of its motion "states that [Unit Manager] Adam Beauboeuf located 48 pages of records in the hard copy and electronic Inmate Central Files," but "neither describes the records Beauboeuf located, indicates whether these records were responsive to plaintiff's FOIA request, nor, if responsive, explains BOP's reasons for withholding them." Id. This finding resulted in the district court denying the Department's motion for summary judgment in part, and in the court ordering the Department to "file a renewed summary judgment motion." Id.

Subsequently, the Department released the 48 pages of documents to Mr. Okeayainneh that were located by Unit Manager Adam Beauboeuf. It then submitted a Notice of Filing in Lieu of a Renewed Motion for Summary Judgment to which it attached a Declaration provided by Unit Manager Beaubouef who purported to attest to the authenticity and reliability of the 48-page document released to Mr. Okeayainneh. This resulted in the district court issuing a Memorandum Opinion filed on June 25, 2021 in which the court held that upon review of the supplemented record, because the "BOP has accounted for the 48 pages of records Beaubouef located, there remains no issue for the Court to resolve." (*See* Appendix 6). The court then entered a final judgment in favor of the Department. Id.

On appeal before the D.C. Circuit Court of Appeals, Mr. Okeayainneh challenged the district court's consideration of Adam Beaubouef's declaration which the Department relied on in support of its motion for summary judgment. Specifically, Mr. Okeayainneh argued that the declaration failed to set forth a statement certifying that it is based on personal knowledge in accordance with 28 U.S.C. § 1746 and Rule

56(c)(4) of the Federal Rules of Civil Procedure. Cf. Cobell v. Norton, 391 F.3d 251 (DC Cir. 2004). In response to Mr. Okeayainneh's contention, the Department moved for summary affirmance by filing a motion to supplement the record to include a revised declaration of Adam Beaubouef which purported to cure the deficiency by adding a "penalty-of-perjury" statement so as to comply with the certification requirements set forth under 28 U.S.C. § 1746, and Rules 11(b) and 56(c)(4) of the Federal Rules of Civil Procedure.

On May 25, 2022, the D.C. Circuit issued an Order granting the Department's motion for summary affirmance, concluding that the declaration of Adam Beaubouef provided by the Department sufficiently complied with the requirements underlying Mr. Okeayainneh's FOIA request. (*See* Appendix 2), *relying on* Mobley v. CIA, 806 F.3d 568, 581 (DC Cir. 2015) ("Agency affidavits—so long as they are relatively detailed and non-conclusory—are accorded a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents.").

The question for review then is presented as follows:

Whether this Court should grant, vacate, and remand the judgment of the D.C. Circuit Court of Appeals sustaining the Department's motion to supplement the record and for summary affirmance under Rule 10(e)(2)(C) of the Federal Rules of Appellate Procedure because the government official whose declaration the Department relied upon in seeking summary affirmance failed to certify, as required with respect to each filing contained in the Department's Motion to Modify the Record on Appeal and for Summary Affirmance pursuant to Rule 10(e)(2)(C), along with the submittance of Adam Beaubouef's revised declaration which failed to state "to the best of the person's knowledge, information, and belief formed after an inquiry reasonable under the circumstance," in accordance with Rule 11(b) of the Federal Rules of Civil Procedure, and in light of this Court's ruling in Surowitz v. Hilton Hotels Corp., 383 U.S 363 (1966).

PARTIES TO THE PROCEEDING

The Petitioner is Julian Okeayainneh, a federal prisoner currently confined at the Federal Correctional Institution Oakdale (FCI Oakdale) located in Oakdale, Louisiana. Mr. Okeayainneh was the petitioner below.

Respondents are the Department of Justice, the Attorney General of the United States, and the Federal Bureau of Prisons, and they are being represented by the Office of the United States Solicitor General, which is an extension of the United States Department of Justice.

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IN THE SUPREME COURT OF THE UNITED STATES

JULIAN OKEAYAINNEH, Petitioner

v.

UNITED STATES DEPARTMENT OF JUSTICE *et al.*, Respondents

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA
(Appeal No. 21-5167)

Petitioner Julian Okeayainneh respectfully asks that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeal for the District of Columbia in Case Number 21-5167, filed on July 13, 2022.

OPINION BELOW

The opinion and judgment of the D.C. Circuit Court of Appeals, which is unpublished, was issued on May 25, 2022, and is attached hereto as Appendix 1-2. A subsequent Order denying Petitioner's request for rehearing *en banc* was issued on July 13, 2022 and is attached hereto as Appendix 3. The District Court's Order and Opinion denying Petitioner's civil action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.*, is attached hereto as Appendix 4-6.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1251(b)(2) and 1254(1). The decision of the D.C. Circuit Court of Appeal for which Petitioner seeks review was issued on May 25, 2022. A petition for rehearing *en banc* was subsequently denied on July 13, 2022. The district court's decision and order dismissing Petitioner's FOIA action under 5 U.S.C. § 552 was filed on June 25, 2021. This petition therefore is filed within 90 days of the D.C. Circuit's final judgment and opinion denying petitioner's appeal, in accordance with Rules 13.3 and 29.2 of this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment 1 provides in part:

"Congress shall make no law … abridging the … right of the people … to petition the Government for a redress of grievances."

United States Constitution, Amendment 5 provides in part:

No person shall be … deprived of life, liberty, or property, without due process of law…

United States Constitution, Amendment 6 provides, in part:

An accused is guaranteed the right to know … the nature of the charges and evidence brought against him.

Section 552. *Public information; agency rules, opinions, orders, records, and proceedings* provides, in relevant part:

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

Rule 11(b) Fed. R. Civ. P. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed *after* an inquiry reasonable under the circumstances. (emphasis added).

Rule 10(e) Fed. R. App. P. Correction or Modification of the Record. (1) If any difference arises about whether the record truly discloses what occurred in the district court, the difference must be submitted to and settled by that court and the record conformed accordingly.

STATEMENT OF THE CASE

I. Administrative Background and Proceedings in the District Court

Mr. Okeayainneh and several others were convicted in the United States District Court for the District of Minnesota of various financial crimes, including conspiracy to commit money laundering. (*See* Criminal Case No. 11-cr-87(1) (MJD/JJK)) (D. Minn. ECF No. 16-1). On August 13, 2012, he was sentenced to a total term of 324 months imprisonment. Several days later, August 29, 2013, the sentencing court issued an Amended Judgment that included restitution in the amount of $4,368,192.01 applicable to each of the defendants convicted. *See* United States v. Okeayainneh, No. 11-cr-87, 2019 WL 4888880, at *1 (D. Minn. Oct. 3, 2019).

Later on, during appellate review of Mr. Okeayainneh's co-defendant, Adetokunbo Olubunmi Adejumo, the Eighth Circuit Court of Appeals issued a ruling in Mr. Adejumo's favor which led to the sentencing court issuing an Order on May 10, 2017 vacating Mr. Adejumbo's restitution obligation. (ECF No. 1218). As noted, because the $4,368,192.01 restitution applied equally to each defendant charged, the district court's May 10, 2017 Order vacating Mr. Adejumo's restitution naturally impacted the remaining co-defendants' sentences, including Mr. Okeayainneh's.[1]

Importantly, Mr. Okeayainneh was not aware that the $4,368,192.01 restitution judgment had been vacated. This information was revealed to him on January 21, 2019 while he was housed at FCI Oakdale. On January 21, 2019, Mr. Okeayainneh requested a copy of his Certified Sentence Computation Data Sheet from his Unit Counselor, B. Senega, and was inadvertently shown a standing order issued by his sentencing court revealing that the $4,368,192.01 restitution had been vacated. Upon being shown this information, Mr. Okeayainneh immediately requested a copy of the document but was told by Counselor Senega that he could not have a copy of the document. Counselor Senega's refusal to provide Mr. Okeayainneh with

[1] Under the bank fraud statute 18 U.S.C. § 1344, the "loss amount" constitutes as a substantive element of the offense that the government is required to establish in order to sustain a conviction under the statute. In particular, the statute provides that a "scheme to defraud includes any plan or course of action intended to both deceive the bank *and* deprive it of something of value." *See* Shaw v. United States, 137 S.Ct. 462 (Dec. 12, 2016). Therefore, in light of the statute's provision and requisite elements that must be established in order to sustain a conviction, the omission of a "loss amount," in essence, renders a conviction under the statute null and void. That is the situation in Mr. Okeayainneh's case following his sentencing court's vacatur of the $4,368,192.01 restitution judgment.

a copy of his sentencing court's order vacating the $4,368,192.01 restitution judgment led to Mr. Okeayainneh attempting to obtain the document through the FOIA process, which ultimately culminated in him filing a petition under 5 U.S.C. § 552 before the district court in the D.C. Circuit challenging the efficacy, soundness, and the reliability of the FOIA process that he was afforded.

Prior to Mr. Okeayainneh's foray before the court, for several months in 2019 he made a number of requests under the FOIA and the Privacy Act attempting to obtain the standing order issued by his sentencing court that he was inadvertently shown on January 21, 2019 by his unit counselor which revealed that the $4,368,192.01 restitution judgment issued in his case has been vacated based on his co-defendant, Adetokunbo Olubunmi Adejumo, successful appeal. Two of the FOIA requests made by Mr. Okeayainneh were presented to the Federal Bureau of Prisons (the "BOP Request"), and a third was presented to the Director of the Office of Information Policy (the "OIP Request"). The BOP Request, which was made on January 25, 2019 and addressed to Matt Mangold, Chief Human Resource Officer at the BOP's Designation and Sentence Computation ("DSCC"), sought the following:

- A copy of ALL records of Information Order Adding Restitution Per Amended Judgment, updated on 09/04/2013 under Criminal No. 11-CR-87(1) (MJD/JJK).
- A copy of ALL records of Information Ordering Restitution Vacated received on 05/15/2017 under Criminal No. 11-CR-87(1) (MJD/JJK).

A subsequent FOIA request by Mr. Okeayainneh was also presented to Matt Mangold on or about February 1, 2019. This request sought the following information:

- A copy of ALL records of Information Order Adding Restitution Per Amended Judgment, updated on 09/04/2013 under Criminal No. 11-CR-87(1) (MJD/JJK).
- A copy of ALL records of Information Ordering Restitution Vacated received on 5/15/2017 under Criminal No. 11-CR-87(1) (MJD/JJK) and accompanied documents Vacating Mandatory Amended Restitution Judgment in the amount of $4,368,192.01, required to "Sustain Conviction" within the meaning of 18 U.S.C. § 1344 – Bank Fraud Statute.

Each FOIA requests made by Mr. Okeayainneh was buttressed by a January 21, 2009 Executive Order[2] issued by former President Barack Obama, and by a March 19, 2009 Memorandum[3] issued by then Attorney General, Eric Holder, to the heads of the nation's Executive Departments and Agencies. The intent in doing so was to highlight the promulgation of policy measures designed to ensure that government officials and agencies fully adhere to the FOIA's processes and intended objectives of complete disclosure of public records, none of which occurred in Mr. Okeayainneh's case.

Because the BOP had failed to respond to Mr. Okeayainneh's FOIA requests in a timely manner, he filed an appeal with the Department of Justice's Office of Information Policy ("OIP"). The OIP, in turn, contacted BOP staff which led to the BOP conducting a search for "any 'records regarding orders for restitution' for Criminal Case No. 11-cr-00087." (Appendix 9). This search reportedly began with a physical search of Mr. Okeayainneh's Inmate Central File and his Electronic Central File ("e-ICF") by his Unit Manager, Adam Beauboeuf. Thereafter, the BOP, through a declaration submitted by Meryl White, an Assistant General Counsel for the Office of the General Counsel overseeing the FOIA and Privacy Act processes, explained that both the hard copy and electronic version of the Central File "contain sentence data to include [a] Pre-Sentence Investigation Report (PSR), Judgment and Commitment Orders (J&C), Statement of Reasons (SOR), state records, Central Inmate Monitoring Requests (CIMs), and the USMS 129 related to a specific inmate." (Appendix 10). Adam Beauboeuf's search, conducted on March 29, 2019, is said to have yielded 48 pages of potentially responsive records. A subsequent search conducted on April 4, 2019 reportedly by an Operations Manager yielded an additional 95 pages of records. However, the document in question—that is, Mr. Okeayainneh's sentencing court's judgment vacating the $4,368,192.01

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[2] The January 21, 2009 Executive Order, which is directed to heads of the Executive Department and Agencies, states that "[a]ll agencies should adopt a presumption in favor of disclosure in order to renew their commitment to the principles embodied in the FOIA, and to usher in a new era of open government." Id. The directive goes on to state that "[t]he presumption of disclosure should be applied to all decisions involving the FOIA." Id.

[3] The March 19, 2009 Memorandum, which was also directed to the Heads of the Executive Department and Agencies, explained that "an agency should not withhold information simply because it may do so legally, or withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption." Id. Mr. Okeayainneh argued before the district court and below that this directive is currently still in effect and applies to each defendant named in his FOIA action.

restitution that was inadvertently shown to Mr. Okeayainneh on January 21, 2019 by an FCI Oakdale Counselor (Counselor Senega) was not among the records produced.

After Mr. Okeayainneh exhausted his administrative remedies, on November 14, 2019 he brought civil action against the DOJ, DSCC's Director/Chief of Human Resources, and the Attorney General of the United States (collectively, the "Department"), contending that the Department "failed to respond to certain of his FOIA requests or properly assert any exemption under [the] FOIA which would justify withholding the requested records." (Appendix 11 & 33). Mr. Okeayainneh also sought injunctive relief "compelling each [d]efendant to provide him with copies of the records sought[.]" (Appendix 35).[4]

After the civil suit was filed, the BOP decided to release in full a May 10, 2017 Order issued by Mr. Okeayainneh's sentencing court. Prior to doing so, the BOP had initially withheld a 28-page SOR in Criminal Case No. 11-cr-00087 under Exceptions 6 and 7(C) of the Act.[5] Mr. Okeayainneh appealed the BOP's decision to do so to the OIP which affirmed.

Once the matter went before the court and after the 28-page SOR was released, on June 22, 2020, Mr. Okeayainneh was allowed to review the 28-page document in the presence of a Unit Manager at the facility where he was housed. While doing so, the document that he was inadvertently shown by Counselor Senego on January 21, 2019 which revealed the vacatur of the $4,368,192.01 restitution issued by his sentencing court was ostensibly missing from the 28-page document.

The Department later moved to dismiss Mr. Okeayainneh's FOIA suit on jurisdictional grounds, arguing that the proper defendant in a FOIA suit is a federal government agency and not individual defendants. The district court agreed and dismissed the suit against DSCC's Director/Chief Human Resources and the Attorney General of the United States but allowed the suit

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[4] The case was originally filed in the United States District Court for the Western District of Louisiana under case number 2:19-cv-1482(SEC). The Louisiana district court, however, *sua sponte* transferred the case to the District of Columbia pursuant to 28 U.S.C. § 1406(a).

[5] It appears that the BOP's decision to release the 28-page SOR was in response to Mr. Okeayainneh's decision to pursue the matter in court. Nevertheless, it is important to note that the 28-page SOR that the BOP released to Mr. Okeayainneh did not contain the actual Order vacating the $4,368,192.01 restitution that was issued in Mr. Okeayainneh's co-defendant's case.

to continue against the BOP. The Department also moved for summary judgment on the grounds that there were "no genuine dispute as to any material fact and [that] the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Specifically, the Department argued that because all the records that Mr. Okeayainneh requested were released to him, including an unredacted copy of his sentencing court's May 10, 2017 Order, there remained no controversy for the court to resolve with respect to the disclosures, and summary judgment is therefore appropriate. The district court agreed, concluding that "[t]here remains no controversy for the Court to resolve with respect to these disclosures." (Appendix 13). In doing so, the district court relied primarily on the declaration provided by Unit Manager Adam Beaubouef which was not certified in the sense that the declaration failed to include the statement that it was executed under penalty of perjury and that the information provided derived from the declarant's own personal knowledge as required by 28 U.S.C. § 1746 and Rule 11(b) of the Federal Rules of Civil Procedure. (Appendix 9, 17-18).

Even though the district court ultimately granted the Department's motion for summary judgment "[w]ith regard to [] 67 pages of records [that the] BOP ha[d] released to [Mr. Okeayainneh]" and held that the Department properly withheld in full [Mr. Okeayainneh's] 28-page Statement of Reasons under FOIA Exception 7(F), the district court initially held that notwithstanding the conclusion that the BOP conducted reasonable searches, the BOP failed to demonstrate that it completely fulfilled its FOIA obligations. In arriving at this conclusion, the district court found that the declaration provided by Unit Manager Beauboeuf in support of the Department's summary judgment motion "states that Beauboeuf located 48 pages of records in the hard copy and electronic Inmate Central Files," but "neither describes the records Beauboeuf located, indicates whether these records were responsive to [Mr. Okeayainneh's] FOIA requests, nor, if responsive, explains [the] BOP's reasons for withholding them." (Appendix 17). As a result, the district court denied the Department's motion for summary judgment in part and ordered it to "file a renewed summary judgment motion." Id.

In complying with the district court's directive, the Department later submitted a Notice of Filing in Lieu of a Renewed Motion for Summary Judgment. Attached to the Department's Notice was yet another a declaration provided by Unit Manager Beaubouef which purported to certify the validity of the records that were released to Mr. Okeayainneh. (Appendix 57-58). In

response, Mr. Okeayainneh filed objections on the grounds that "genuine issues of material facts are in dispute with respect to the BOP's search for responsive records and the wrongful withholding of the records [Unit Manager] Beauboeuf located." (Appendix 6). However, finding that the "BOP demonstrate[d] that the Judgment in [Mr. Okeayainneh's] Criminal Case and Memorandum of Law and Order were among the records [the] BOP [] released in full," the district court concluded that "there remains no issue for the Court to resolve." Id. In doing so, the court entered judgment in favor of the Department. Mr. Okeayainneh timely appealed.

II. Proceedings in the D.C. Circuit Court of Appeals

On appeal, Mr. Okeayainneh continued to maintain that the declaration provided by Unit Manager Adam Beaubouef attesting to the accuracy and reliability of the documents provided to him during the FOIA process and upon which the district court relied in finding that the Department had fully complied with his FOIA requests is in fact unreliable and inaccurate because the declaration failed to state and certify that it is based on Mr. Beaubouef's own personal knowledge as required by 28 U.S.C. § 1746, Rule 11(b) of the Federal Rules of Civil Procedure, and Rule 5(a) of the D.C. Circuit Local Rules.[6] Cf. In response to Mr. Okeayainneh's position, the Department, in a motion filed on February 28, 2022, (Appendix 40-55), moved to modify the record under Federal Rule of Appellate Procedure 10(e)(2) to include a *revised* declaration provided by Adam Beaubouef attesting, under 28 U.S.C. § 1746, to the authenticity and reliability of the documents that were given to Mr. Okeayainneh during the FOIA process. (Appendix 41, 45-46). The Department also moved for summary affirmance on the grounds that the "submit[ed] [] amended declaration of Adam Beaubouef ... resolve[d] the sole issue on appeal"—that is, Mr. Beaubouef's revised declaration cured the § 1746 deficiency that is the focus of Mr. Okeayainneh's appeal, which negate the need for further litigation. (Appendix 48), *citing* Colbert v. Potter, 471 F.3d 158, 165-166 (D.C. Cir. 2006).

On March 4, 2022, Mr. Okeayainneh filed an opposition to the Department's motion to modify the appeal record and for summary judgment, arguing that the revised declaration provided by Mr. Beaubouef upon which

[6] Rule 5(a) of the DC Circuit Local Rules, as amended, states as follows: **Certificate of Parties and Disclosure Statement to be Attached.** "A certificate of parties and amici curiae, as described in Circuit Rule 28(a)(1)(A), and a disclosure statement, as described in Circuit Rule 26.1, must be attached as an addendum to the petition. Any required disclosure statement must also be attached to any answer to the petition."

the Department relied in support of its summary affirmance motion remains deficient with regards to the certification requirement set forth under 28 U.S.C. § 1746 and D.C. Circuit Local Rule 5(a). (Appendix 59-61). Specifically, Mr. Okeayainneh argued that even though D.C. Circuit precedent establishes that "[a] declaration or certification that includes the disclaimer 'to the best of [the declarant's] knowledge, information or belief' is sufficient under the local rule [5.1(h) and] the statute [28 U.S.C. § 1746]," and Mr. Beaubouef's revised declaration fail to include either of those statements. (Appendix 60), *citing* Cobell v. Norton, 391 F.3d 251 (D.C. Cir 2004). Moreover, Mr. Okeayainneh went on to argue that "[a]uthentication is a condition precedent to the admissibility of a declaration where the condition is satisfied by evidence sufficient to support a finding that the matter is what its proponent claims," id., and that condition is absent from Mr. Beaubouef's declaration.

On March 8, 2022, the Department filed a reply to Mr. Okeayainneh's response to its motion to modify the record on appeal and for summary judgment, arguing that Mr. Okeayainneh's contention that its "proffered sworn version of [Mr.] Beaubouef['s] declaration ... still fails to comply with the requirement set forth in 28 U.S.C. § 1746 and the Federal Rules of Civil Procedure" ... "is incorrect" because "an explicit assertion of 'personal knowledge' is not required in a declaration in FOIA cases." (Appendix 62), *citing* Weisberg v. U.S. Department of Justice, 705 F.2d 1344, 1358 (D.C. Cir. 1983) (approving of testimony of a supervisor because "he consulted with his colleagues who had personal knowledge" of the relevant aspects of the search). The Department also argued that since "[Mr.] Beaubouef's declaration asserts facts which are based on his own actions" which makes him "'intimately involved' in the[] events ... that he describes," "'the information contained within the declaration [therefore] is based on [Mr. Beaubouef's] personal knowledge,' and Okeayainneh's [] argument [to the contrary] lacks merit." (Appendix 62-63), *citing* DiBacco v. Department of the Army, 926 F.3d 827, 833 (D.C. Cir. 2019). Those averments notwithstanding, where the Department got it wrong is that even though Mr. Beaubouef's declaration states that "'[he] conducted a search' [and] '[he] located three responsive records' [to which he] '[a]attached ... a true and accurate copy ... of the 48 pages of records [he] located,'" (Appendix 63), the declaration itself failed to describe the records Mr. Beauboeuf located, nor did it indicate whether the records were responsive to Mr. Okeayainneh's FOIA requests.

Rejecting Mr. Okeayainneh's subsequent motion for leave to file a surreply, the D.C. Circuit, in an Order filed on May 25, 2022, sided with the Department. In doing so, the Court granted the Department's motion to supplement the record and for summary affirmance on the grounds that Mr. Beauboeuf's revised declaration, "which adds a penalty-of-perjury statement, is in the interests of justice" and that "[t]aking into account [Mr.] Beaubouef's declaration, [the Department's] search in response to [Mr. Okeayainneh's] Freedom of Information Act request was adequate." (Appendix 2), *citing* Mobley v. CIA, 806 F.3d 568, 581 (D.C. Cir. 2015) ("Agency affidavits—so long as they are relatively detailed and non-conclusory—are accorded a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents.") & Taxpayers Watchdog Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987).

On June 8, 2022, Mr. Okeayainneh filed a petition for rehearing and rehearing *en banc*, and the following day he filed an amended petition for rehearing and rehearing *en banc* which the Court later denied on July 13, 2022. (Appendix 3).

This petition for certiorari now follows.

REASON FOR GRANTING THE PETITION

I. Whether this Court should grant, vacate, and remand the judgment of the D.C. Circuit Court of Appeals which sustained the Department's motion to supplement the record and for summary affirmance under Rule 10(e)(2)(C) of the Federal Rules of Appellate Procedure even though the supplemented record failed to contain the phrase "to the best of the person's knowledge, information, and belief formed after an inquiry reasonable under the circumstance" certifying that the information presented in the record is authentic, reliable, and accurately represented in a manner that satisfy the goal of 28 U.S.C. § 1746 and Rule 11(b) of the Federal Rules of Civil Procedure.

A. Discussion of Authorities and Relevant Law

When an agency seeks summary judgment on the basis that it conducted an adequate search, it must provide a "relatively detailed" affidavit describing the scope of that search. *See* Ituraea v. Comptroller of Currency, 315 F.3d 311, 314 (D.C. Cir. 2003). Importantly, it is not enough for the affidavit to state in conclusory fashion that the agency "conducted a review of [the records and files] which [] contain information that [the plaintiff] requested" and did not find anything responsive to the request. Weisberg v. DOJ, 627 F.2d 365, 370 (D.C. Cir. 1980). Rather, affidavits that "do not denote which files were searched or by whom, do not reflect any systematic approach to document location, and do not provide information specific enough to enable [the plaintiff] to challenge the procedures utilized" are insufficient to support a motion for summary judgment. Id. at 371.

On the other hand, once the agency has provided a "reasonably detailed" affidavit describing its search, the burden then shifts to the FOIA requester to produce "countervailing evidence" suggesting that a genuine dispute of material fact exists as to the adequacy of the search. *See* Morley v. CIA, 508 F.3d 1108, 1116 (D.C. Cir. 2007). Ultimately, "[i]f a review of the record raises substantial doubt as to the reasonableness of a search, especially in light of 'well-defined requests and positive indications of overlooked materials,' then summary judgment may be inappropriate." Marino v. DOJ, 993 F. Supp.2d 1, 2013 WL 5979753, at *6 (D.D.C. Nov. 12, 2013), *quoting* Founding Church of Scientology of Wash., D.C. v. NSA, 610 F.2d 824, 837 (D.C. Cir. 1979).

In the case here, the revised declaration of Adam Beaubouef submitted by the Department as proof that it properly and adequately complied with Mr. Okeayainneh's FOIA requests and as basis for its summary affirmance application fell woefully short of the standard of adequacy and reasonableness required whenever an agency aims to respond to an FOIA requester's request to produce documents that fall within the scope of the public's right to know. As a consequence, the D.C. Circuit's approval of the Department's failure to properly and adequately comply with the FOIA process raises substantial doubt about the accuracy, reliability, and the effectiveness of the process itself, while undermining Mr. Okeayainneh's Fifth Amendment due process right inherent in the FOIA process, and his Sixth Amendment right "to know ... the nature of the charges and evidence" upon which his conviction rest.

For those reasons, the circumstances underlying this case which speaks directly to the efficacy and the reliability of the FOIA process and to whether the application of the Act itself, when juxtaposed with the responsibility ascribed to government officials to be fair and judicious in their duty, is (a) consistent with Congress' intent and objective in enacting the FOIA, and if not, (b) whether such violation warrants this Court's review.

B. Discussion of Fact and Authorities

As indicated above, the focus of this petition for certiorari is to ascertain whether the D.C. Circuit's interpretation of the duty and responsibility placed upon government officials to ensure that records and information disseminated through the FOIA process meet the requirements of accuracy, reliability, authenticity, and fairness as Congress intended when it enacted the FOIA. *See* United States DOJ v. Tax Analysts, 492 U.S. 136 (2016) (explaining that "[a] purpose of the Freedom of Information Act (FOIA) (5 USCS 552) is to open agency action to the light of public scrutiny, by requiring agencies to adhere to a philosophy of full disclosure, under a belief that such a philosophy, when put into practice, will help to insure an informed citizenry, vital to the functioning of a democratic society" and that "a FOIA provision (5 U.S.C. § 552(a)(4)(B)) [] confers jurisdiction on the Federal District Courts 'to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld[.]'"); *see also* United States Fish & Wildlife Services v. Sierra Club Inc., 141 S.Ct. 777, 785 (2021) (reiterating that "FOIA mandates the disclosure of

documents held by a federal agency unless the documents fall within one of nine enumerated exemptions."), *citing* 5 U. S. C. §552(b).

Congress enacted the FOIA to "permit access to official information long shielded unnecessarily from public view." *See* Milner v. Department of the Navy, 562 U.S. 565, 131 S.Ct. 1259, 179 L.Ed.2d 268 (2011), *quoting* EPA v. Mink, 410 U.S. 73, 80, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973). However, Congress was also aware that "legitimate governmental and private interests could be harmed by release of certain types of information." Department of Justice v. Julian, 486 U.S. 1, 8, 108 S.Ct. 1606, 100 L.Ed.2d 1 (1988), *quoting* Federal Bureau of Investigation v. Abramson, 456 U.S. 615, 621, 102 S.Ct. 2054, 72 L.Ed.2d 376 (1982). The FOIA thus "balance[s] the public's need for access to official information with the Government's need for confidentiality." Weinberger v. Catholic Action of Hawaii, 454 U.S. 139, 144, 102 S.Ct. 197, 70 L.Ed.2d 298 (1981). To that end, the FOIA exempts nine categories of records from the government's otherwise broad duty of disclosure. *See* 5 U.S.C. § 552(b). While those exemptions "must be narrowly construed," Milner, 562 U.S. at 565, *quoting* Abramson, 456 U.S. at 630), courts still must respect the balance that Congress struck and give the exemptions the "meaningful reach and application" that their plain text requires. John Doe Agency v. John Doe Corp., 493 U.S. 146, 152, 110 S.Ct. 471, 107 L.Ed.2d 462 (1989); *see also* DiBacco v. United States Army, 795 F.3d 178, 183 (D.C. Cir. 2015).

At issue in this case is Congress' intent with respect to the accuracy and reliability of the record and information disclosed during the FOIA process. In other words, as explained above, it is not enough for government officials to profess to have complied with the FOIA process. Cf. Weisberg v. DOJ, 627 F.2d 365 (D.C. Cir. 1980). To be in full compliance with the FOIA process as Congress intended, government officials must also demonstrate that the information and/or record disseminated is accurate and authentic and is exactly the record and/or information requested by the applicant who initiated the FOIA process.

In the case here, the Department, in responding to Mr. Okeayainneh's FOIA suit, requested and was granted summary affirmance by the D.C. Circuit based on the Department's bald and unverified representation that it properly adhered to the requirements of accuracy and reliability when complying with Mr. Okeayainneh's FOIA requests and that its compliance met all the requirements set forth under Rule 10(e)(2)(C) of the Federal Rules of Appellate Procedure, Rule 11(b) of the Federal Rules of Civil Procedure,

and 28 U.S.C. § 1746. The D.C. Circuit, finding the Department's averment to be true, granted its motion to supplement the record and for summary affirmance. In doing so, the Court relied on its decision in Mobley v. CIA, 806 F.3d at 581 (D.C. Cir. 2015) which held that "[a]gency affidavits—so long as they are relatively detailed and non-conclusory—are accorded a presumption of good faith which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents." Id. On that basis, the Court concluded that "[Unit Manager] Beaubouef's [revised] declaration" rendered the [Department's] search in response to [Mr. Okeayainneh's] Freedom of Information Act request[s] ... adequate." (Appendix 2). This finding, however, is flawed for two basic reasons. First, it contravenes with the Court's holding in Weisberg v. DOJ, 627 F.2d at 371 (D.C. Cir. 1980) where the Court stated that affidavits that "do not denote which files were searched or by whom, do not reflect any systematic approach to document location, and do not provide information specific enough to enable [the plaintiff] to challenge the procedures utilized" are insufficient to support a motion for summary judgment. Id. Secondly, the finding ignored the requirement of Rule 11(b) with regards to Mr. Beaubouef purporting to provide first-hand knowledge about the accuracy and the availability of documents germane to Mr. Okeayainneh's criminal case held by the DOJ. And third, the Court's finding fails to account for the accuracy, authenticity, and reliability of the record and information that were provided to Mr. Okeayainneh by the Department through the efforts of Mr. Beaubouef who merely claimed to have looked for the documents and only discovered documents that his search uncovered, which does not speak to record's accuracy, authenticity, and reliability. In other words, even though the Department argued that it fulfilled its obligation to Mr. Okeayainneh throughout the FOIA process by providing him with all the documents and records that he requested, the crucial point that has been overlooked (and continues to be overlooked) is the fact that the piece of document/record that Mr. Okeayainneh had diligently sought throughout the FOIA process—*i.e.*, the Order issued by his sentencing court vacating the $4,368,192.01 restitution following his co-defendant's appeal which was accidentally shown to him by his Unit Counselor on January 21, 2019, was not among the documents/records that were provided to Mr. Okeayainneh under the FOIA. And the fact that Mr. Beaubouef's revised declaration described the areas where *he* looked to gather the records sought by Mr. Okeayainneh, and in doing so, attested to have fully complied with the requirements of 28 U.S.C. § 1746, these assertions, in effect, skirts the Department's obligation to produce the actual documents and/or information that Mr. Okeayainneh

sought throughout the FOIA process—documents that are clearly within the purview of his right to have. Cf. National Archives & Records Admin. v. Favish, 541 U.S. 157, 159 (2004) (observing that "FOIA withholding cannot be predicated on the requester's identity").

Under Rule 10(e)(2) of the Federal Rule of Appellate Procedure, it provides that "[i]f anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected and a supplemental record may be certified and forwarded ... by the court of appeals." Id. Based on the foregoing discussion, that has not been the case here considering that no "error" or "accident" occurred with respect to the production of documents that Mr. Okeayainneh sought and is statutorily entitled to. The document simply was never given to him and is improperly being withheld under the guise that his claims are "purely speculative claims about the existence and discoverability of other documents." *quoting* Mobley v. CIA, 806 F.3d at 581. Indeed, a declaration provided by Mr. Beaubouef, revised or not, to include a statement under 28 U.S.C. § 1746 and the various steps taken by him in gathering the records that he later attempted to certify through his declaration is meaningless if he cannot declare, through first-hand knowledge, that the records and documents he obtained are in fact consistent with the actual records that exists—records that are part of Mr. Okeayainneh's underlying criminal case file.

In Colbert v. Potter, 471 F.3d at 166, the D.C. Circuit reviewed the district court's decision to dismiss an action for failure to timely file suit. Colbert, 471 F.3d at 160. The district court determined that the plaintiff had filed the complaint based "on the date stamped on the back of a [Domestic Return Receipt]." Id. The plaintiff later challenged the date on the Domestic Return Receipt by arguing that the defendant had not "provided an image of the reverse side of the card" as evidence which presumably would have bear "a postmark with a later date." Id. The defendant, however, argued that "time constraints" had prevented it from filing both sides of the Domestic Return Receipt in the district court and later moved for leave to submit a complete copy of the Domestic Return Receipt under Rule 10(e)(2)(C) of the Federal Rules of Appellate Procedure. Colbert, 471 F.3d at 160-61. The D.C. Circuit ultimately "agreed ... that the record should be supplemented to include the original receipt and therefore ordered [the defendant] to file the original Domestic Return Receipt with the court." Id. at 166. Although recognizing that "[a]ppellate courts do not ordinarily consider evidence not contained in the record developed at trial," the Court noted that "[i]t [was] within [its]

discretion ... to make limited exceptions to this rule when 'injustice might otherwise result." Id.

In Mr. Okeayainneh's case, while the D.C. Circuit alluded to Colbert v. Potter as basis for allowing the Department to supplement the record with Mr. Beaubouef's revised declaration, the situation in Potter is inapposite to the situation in this case. As noted, no "mistake" or "accident" occurred which, like Potter, would have warranted the Department being granted permission to supplement the record. Instead, a crucial piece of document that is favorable to Mr. Okeayainneh being able to effectively challenge the legality of his ongoing incarceration was intentionally withheld from him throughout the FOIA process—a process that the courts have repeated stated has been designed with the goal of ensuring that claimants like Mr. Okeayainneh are afforded not only full and complete access to records and documentation favorable them that are in the possession of government officials, but also that they are afforded a fair and meaningful process that the Constitution's Fifth Amendment guarantees. Cf. Republic of Panama v. BCCI Holdings, 119 F.3d 935, 946 (11th Cir. 1997) ("In order to evaluate whether the Fifth Amendment requirements of fairness and reasonableness have been satisfied, courts should balance the burdens imposed on the individual defendant against the federal interest involved in the litigation.").

In sum, in deciding Surowitz v. Hilton Hotels Corp., 383 U.S. 363 (1966), a case that honed in on the precise subject matter at play here that continues to threatens the notion of fairness that is imperative to maintaining confidence not only in the FOIA process but also in the judicial process, this Court, speaking directly to the lower courts' growing proclivity towards granting summary dismissals, explained that "[it] cannot construe ... any [] one of the Federal Rules as compelling courts to summarily dismiss[] without any answer or argument at all." Id. at 373. Concerned that the growing popularity to summarily dismiss disputes run the risk of inadvertently allowing foul play to go unnoticed and ultimately "defeat the ends of justice," id. at 373, the Court went on to explain that it is "cases like this where grave charges of fraud are shown by the record to be based on reasonable beliefs growing out of careful investigation." Id. The Court continued by explaining that "[t]he basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion." Id. The same is true in the case at bar.

Contrary to the D.C. Circuit's view, the claims presented by Mr. Okeayainneh for appellate review were not "purely speculative claims about

the existence and discoverability of other documents." (Appendix 2), *relying on* Mobley, 806 F.3d at 581. And had he been allowed to proceed with his claims on the merits, there is a strong likelihood that whatever speculation the D.C. Circuit seemed to have had about the merits of his claims would have transformed into a proven case.

CONCLUSION

The judgment of the D.C. Circuit Court of Appeals should be reversed, and the case should be remanded to the D.C. Circuit for consideration of Mr. Okeayainneh's appeal on the merits.

September 26th, 2022

Respectfully submitted,
=Without Prejudice=

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No.

IN THE

Supreme Court of the United States

JULIAN OKEAYAINNEH,

Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF PRISONS, DIRECTOR/CHIEF of HUMAN RESOURCES,
UNITED STATES ATTORNEY GENERAL,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia

PETITIONER'S APPENDICES

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