

1 TONY WEST
Assistant Attorney General
2 ELIZABETH J. SHAPIRO
Deputy Branch Director
3 BRIGHAM J. BOWEN (DC Bar No. 981555)
Trial Attorney
4 United States Department of Justice
Civil Division, Federal Programs Branch
5 Post Office Box 883
Washington, D.C. 20044
6 Tel: (202) 514-6289
Fax: (202) 307-0449
7 brigham.bowen@usdoj.gov

8
9 UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

10 KENNETH ALLEN,
11 Plaintiff,

12 v.

13 DEPARTMENT OF HOMELAND
14 SECURITY and U.S. DEPARTMENT OF
STATE, *et al.*,
15 Defendants.

09-CV-00373-TUC-FRZ

**DEFENDANTS' PARTIAL MOTION
TO DISMISS PLAINTIFF'S
AMENDED COMPLAINT**

16
17 Pursuant to Fed. R. Civ. P. 12(b), Defendants the U.S. Department of Homeland
18 Security and the U.S. Department of State hereby move the Court to dismiss, in part, this
19 Freedom of Information Act action for lack of jurisdiction and for failure to state a claim for
20 which relief can be granted. The grounds justifying dismissal are set forth in the
21 accompanying memorandum.
22
23

24 Dated: October 5, 2009

Respectfully submitted,

25 TONY WEST
Assistant Attorney General

26 ELIZABETH J. SHAPIRO
27 Deputy Branch Director
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

s/ Brigham J. Bowen
BRIGHAM J. BOWEN
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
Tel: (202) 514-6289
Fax: (202) 307-0449
brigham.bowen@usdoj.gov

Mailing Address:
Post Office Box 883
Washington, D.C. 20044

Courier Address:
20 Massachusetts Ave., N.W.
Washington, D.C. 20001

Attorneys for Defendants

1 TONY WEST
Assistant Attorney General
2 ELIZABETH J. SHAPIRO
Deputy Branch Director
3 BRIGHAM J. BOWEN (DC Bar No. 981555)
Trial Attorney
4 United States Department of Justice
Civil Division, Federal Programs Branch
5 Post Office Box 883
Washington, D.C. 20044
6 Tel: (202) 514-6289
Fax: (202) 307-0449
7 brigham.bowen@usdoj.gov

8
9 UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

10 KENNETH ALLEN,
11 Plaintiff,

09-CV-00373-TUC-FRZ

12 v.

13 DEPARTMENT OF HOMELAND
14 SECURITY and U.S. DEPARTMENT OF
STATE, *et al.*,
15 Defendants.

**MEMORANDUM IN SUPPORT OF
DEFENDANTS' PARTIAL MOTION
TO DISMISS PLAINTIFF'S
AMENDED COMPLAINT**

16
17 By this Freedom of Information Act ("FOIA") action, *pro se* Plaintiff Kenneth Allen
18 seeks private passport, travel, and other records relating to President Barack Obama, his
19 mother, Stanley Ann Dunham, and his mother's former husband, Lolo Soetoro, from the U.S.
20 Department of State ("DOS") and the U.S. Citizenship and Immigration Service ("USCIS").¹
21 In submitting these requests, Plaintiff has failed to comply with agency regulations
22 promulgated to protect the personal privacy of U.S. citizens and residents. Defendants
23 therefore move the Court to dismiss Plaintiff's Amended Complaint [Dkt. #11-1] with
24 respect to records concerning President Obama.
25
26

27
28 ¹ USCIS is a component of the U.S. Department of Homeland Security ("DHS"), and
is the agency to which Allen has directed his FOIA requests.

I. BACKGROUND

1
2 Four FOIA requests submitted by Allen (two to USCIS and two to DOS) are at issue
3 in this litigation. The first USCIS request, sent on February 9, 2009, requested a variety of
4 putative records regarding the President, including “an original copy” of the President’s birth
5 certificate, “immigration records,” naturalization records, name-change records, and
6 passports. Am. Compl. ¶ 14 & Defs.’ Ex. A (“2/9 USCIS Request”). USCIS responded to
7 this request on February 19, 2009, and informed Allen that “DHS regulations require, in the
8 case of third party information requests, a statement from the individual verifying his or her
9 identity and certifying that individual’s agreement that records concerning him or her may be
10 accessed, analyzed and released to a third party.” Defs.’ Ex. B (“2/19 USCIS Response”) at
11 2 (citing 6 C.F.R. § 5.21(f)); *see also* Am. Compl. ¶ 15. Because Allen had not complied
12 with these regulations, USCIS requested that Allen provide the necessary privacy waiver
13 within thirty days and informed Allen that the FOIA request would be administratively
14 closed for failure to comply after that time. 2/19 USCIS Response at 2.

15 Allen did not respond directly to this letter; rather, he submitted a new, revised FOIA
16 request, dated March 1, 2009. Am. Compl. ¶ 16 & Defs.’ Ex. C (“3/1 USCIS Request”). In
17 this second request, Allen sought many of the same putative documents (not including the
18 birth certificate), but altered the request to refer to “Barry Soetoro,” instead of Barack
19 Obama. 3/1 USCIS Request at 1-2. In addition, Allen sought copies of “Stanley Ann
20 Obama, aka Stanley Ann Dunhams, aka Stanley Ann Soetoro’s” passport, as well as the
21 “passport history of Lolo Setoro, M.A.” *Id.* at 2. USCIS received this request on March 18,
22 2009, and responded on that same day by requesting the previously-requested waiver, signed
23 by the “subject of record.” Defs.’ Ex. D (“3/18 USCIS Response”); *see also* Am. Compl. ¶¶
24 16, 35.

25 On March 31, 2009, Allen filed an administrative appeal to USCIS regarding its
26 response to his second FOIA request, contending, *inter alia*, that federal privacy laws, such
27 as the Privacy Act and the privacy-related exemptions embodied in the FOIA, apply only to
28

1 U.S. citizens and permanent resident aliens, and not to other foreign persons. Am. Compl.
2 ¶ 18 & Defs.’ Ex. E (“Allen USCIS Appeal”).² At the time this lawsuit was commenced, this
3 appeal remained pending before USCIS.³

4 Separately, Allen submitted a FOIA request to the U.S. Department of State on
5 February 4, 2009, seeking “information that would pertain to aka Barry Soetoro or Barack H
6 Obama,” in addition to “a copy of Barack Obamas legal name” and “Barack h. Obama’s
7 Birth certificate from Hawii.” Defs.’ Ex. 6 (“2/4 State Request”). The Department of State
8 sent Allen an e-mail acknowledgment on February 17, 2009, and informed Allen that
9 requests for third-party information “cannot be processed without the required original
10 [privacy-waiver] documentation required in our FOIA regulations.” Defs.’ Ex. H (“2/17
11 State Response”) (citing 22 C.F.R. § 171.12(a)). DOS further instructed Allen to resubmit
12 his request by mail with the necessary documentation. *Id.* Allen responded by submitting
13 another request, dated February 20, 2009, seeking a broader range of records concerning
14 President Obama, including “immigration records,” educational records from Indonesia,
15 “[r]ecords showing if Barry Seotoro is Barack H. Obamas legal name,” and passports.
16 Defs.’ Ex. I (“2/20 State Request”); *see also* Am. Compl. ¶ 44. In this second request, Allen
17 also sought Stanley Ann Dunham’s passports. 2/20 State Request at 2. DOS responded on
18 June 1, 2009, again informing Allen, *inter alia*, that requests for third-party records must be

20
21 ² This appeal addressed only the second of Allen’s requests to USCIS. Allen USCIS
22 Appeal at 2 (“And the request I am appealing is the request dated March 1st 2009.”).

23 ³ In a September 17, 2009 determination regarding Allen’s appeal, USCIS affirmed in
24 part and modified in part its prior determination regarding his request. In particular, USCIS
25 (1) confirmed that by DHS regulation, a valid consent to disclosure (or “waiver of
26 confidentiality”) is required before USCIS will search its files for records concerning a living
27 person; (2) confirmed that this requirement applies regardless of that person’s alleged
28 citizenship; (3) notified Allen that, even though USCIS would not expect to maintain files
regarding President Obama’s mother, Stanley Dunham (who is widely known to be deceased
and therefore not covered by the DHS privacy regulations, *see* 6 C.F.R. § 5.3), USCIS
conducted a search and found no responsive records; and (4) informed Allen that USCIS was
commencing a search for records regarding Lolo Soetoro (who is also widely known to be
deceased). Defs.’ Ex. F.

1 accompanied by valid third-party privacy authorizations. Defs.’ Ex. J (“6/1 State
2 Response”).

3 II. ARGUMENT

4 The “sole cognizable public interest for FOIA is the interest ‘to open agency action to
5 the light of public scrutiny,’ to inform the citizenry ‘about what their government is up to.’”
6 *Rosenfeld v. U.S. Dep’t of Justice*, 57 F.3d 803, 811 (9th Cir. 1995) (quoting *Dep’t of Justice*
7 *v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)). It is not designed
8 to allow the citizenry unfettered access to the private affairs of other citizens, however
9 famous they may be. *Billington v. Department of Justice*, 11 F. Supp. 2d 45, 62 (D.D.C.
10 1998) (although public officials in some circumstances have diminished privacy, they
11 maintain privacy interests in nonpublic information), *aff’d in part, vacated in part on other*
12 *grounds*, 233 F.3d 581 (D.C. Cir. 2000). Thus, private information about a public figure that
13 does not reveal the operations or activities of government “falls outside the ambit of the
14 public interest that the FOIA was enacted to serve.” *Reporters Comm.*, 489 U.S. at 775.
15 The FOIA (along with the Privacy Act of 1974, 5 U.S.C. § 552a, and other statutory and
16 regulatory provisions) is carefully crafted to balance the public interest in disclosure of
17 government information with an individual’s right to privacy. *See Blazy v. Tenet*, 194 F.3d
18 90, 96 (D.C. Cir. 1999) (quoting *Legislative History of the Privacy Act of 1974*, at 861 (1976)
19 (noting that the original congressional staffs observed that “[p]erhaps the most difficult task
20 in drafting Federal privacy legislation was that of determining the proper balance between
21 the public’s right to know about the conduct of their government and their equally important
22 right to have information which is personal to them maintained with the greatest degree of
23 confidence by Federal agencies”).

24 In keeping with this balanced scheme of disclosure and privacy protection, both
25 agency defendants here have promulgated regulations aimed at protecting individual privacy
26 and, specifically, information protected by the Privacy Act against unwarranted intrusion.
27 These regulations dictate that FOIA requesters seeking records regarding living third party
28

1 individuals obtain authorization from those individuals to obtain their records. The relevant
2 Department of State regulation requires that “requests for records pertaining to another
3 individual shall be processed under the FOIA and must be accompanied by a written
4 authorization for access by the individual, notarized or made under penalty of perjury, or by
5 proof that the individual is deceased (e.g., death certificate or obituary).” 22 C.F.R.
6 § 171.12(a). DHS’s regulations likewise state that “[i]f you are making a request for records
7 about another individual, either a written authorization signed by that individual permitting
8 disclosure of those records to you or proof that that individual is deceased (for example, a
9 copy of a death certificate or an obituary) must be submitted.” 6 C.F.R. § 5.3; *see also*
10 *id.* § 5.21(f) (“If you are making a request for records concerning an individual on behalf of
11 that individual, you must provide a statement from the individual verifying the identity of the
12 individual as provided in paragraph (d) of this section. You must also provide a statement
13 from the individual certifying the individual’s agreement that records concerning the
14 individual may be released to you.”).

15 The mandatory nature of agency FOIA regulations such as these is enshrined in the
16 FOIA itself, which requires that requests be “made in accordance with published rules stating
17 the time, place, fees (if any), and procedures to be followed.” 5 U.S.C. § 552(a)(3)(A);
18 *West v. Jackson*, 448 F. Supp. 2d 207, 211 (D.D.C. 2006) (“A requester must comply with an
19 agency’s published regulations for filing a proper FOIA request.”). Accordingly, “[f]ailure
20 to comply with agency FOIA regulations amounts to a failure to exhaust administrative
21 remedies, which warrants dismissal.” *Dale v. IRS*, 238 F. Supp. 2d 99, 103 (D.D.C. 2002);
22 *see also In re Steele*, 799 F.2d 461, 465-66 (9th Cir. 1986) (observing that exhaustion of
23 administrative remedies is “required under the FOIA before that party can seek judicial
24 review” and that “[w]here no attempt to comply fully with agency procedures has been made,
25 the courts will assert their lack of jurisdiction under the exhaustion doctrine”).

26 It is beyond dispute that Allen, in seeking access to private records concerning
27
28

1 President Obama, has failed to comply with these regulations.⁴ His underlying FOIA
2 requests were not accompanied by the required third-party waivers, and the Amended
3 Complaint likewise contains no allegation that such waivers were submitted. *See Am.*
4 *Compl.*; Allen USCIS Appeal at 2 (suggesting that Allen sought, but had not received, a
5 waiver). Absent the appropriate waivers, Allen's FOIA requests for private records relating
6 to President Obama are not perfected, and his claims for these records must be dismissed.
7 *See Pusa v. FBI*, No. 99-04603, slip op. at 5-6 (C.D. Cal. Aug. 5, 1999) (dismissing case
8 because plaintiff did not comply with agency regulations concerning third-party requests);
9 *Harvey v. U.S. Dep't of Justice*, No. CV 92-176, slip op. at 17-18 (D. Mont. Jan. 9, 1996)
10 (declining to grant motion for production of third-party records because plaintiff failed to
11 submit authorization at the administrative level), *aff'd on other grounds*, 116 F.3d 484
12 (9th Cir. June 3, 1997) (unpublished table decision); *Freedom Magazine v. IRS*, No. 91-4536,
13 1992 U.S. Dist. LEXIS 18099, at *10-13 (C.D. Cal. Nov. 13, 1992) (finding that court lacked
14 jurisdiction when, prior to filing suit, plaintiff failed to provide waivers for third-party
15 records as required by IRS regulations).⁵

16 III. CONCLUSION

17 For the foregoing reasons, the Court should grant Defendants' motion to dismiss
18 Plaintiff's Amended Complaint to the extent it seeks records relating to President Obama.⁶

19 _____
20 ⁴ Because Defendants' privacy-waiver regulations do not apply to deceased persons,
21 Defendants do not seek to dismiss Allen's claims insofar as they relate to records concerning
22 Stanley Dunham or Lolo Soetoro. These records are beyond the scope of this motion to
dismiss and will be addressed in a later motion for summary judgment.

23 ⁵ To the extent Allen's FOIA requests refer to "Barry Soetoro" as a purported
24 individual different from President Obama, such a distinction is immaterial for purposes of
FOIA's exhaustion requirement. Even indulging the notion that a "Barry Soetoro" exists
25 (and has not been shown by Allen to be deceased), and that Defendants possess records
concerning such a person, Allen has made no allegation that he has obtained and provided to
Defendants the necessary privacy waivers to justify searches for such putative records.

26 ⁶ Defendants also request that the court dismiss John Does 1 through 49 as defendants
27 in this lawsuit. Allen's original complaint named such defendants and signaled an intent to
discover their identities during the course of the lawsuit. However, Allen's Motion for Leave
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: October 5, 2009

Respectfully submitted,

TONY WEST
Assistant Attorney General

ELIZABETH J. SHAPIRO
Deputy Branch Director

s/ Brigham J. Bowen
BRIGHAM J. BOWEN
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
Tel: (202) 514-6289
Fax: (202) 307-0449
brigham.bowen@usdoj.gov

Mailing Address:
Post Office Box 883
Washington, D.C. 20044

Courier Address:
20 Massachusetts Ave., N.W.
Washington, D.C. 20001

Attorneys for Defendants

to Amend and his Amended Complaint disclaim an intent to sue any defendants other than the two agency defendants. *See* Mem. in Supp. of Mot. for Leave to Amend at 3-4 (stating that “I have no intension of seeking any other actions against the employee’s of the Defendants”); Am. Compl. ¶ 4 (identifying “[t]he Defendants” as DHS and DOS), ¶ 6 (same). Nonetheless, the phrases “et al.” and “Inclusive 1 thru 48” appear in and below the caption of the Amended Complaint, and certain allegations still appear to relate to such putative John Doe defendants. *See, e.g., id.* ¶¶ 4, 6. The government presumes that the inclusion of such vestigial references was mere oversight on Allen’s part. In any event, as Allen rightly observes, the proper defendant in a FOIA action is the custodial agency and not any individual. Mem. in Supp. of Mot. for Leave to Amend at 3-4 (citing case law and observing that the “proper party” to this action “would be the agency’s the Department of Homeland Security and the State Department”).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2009, I caused a copy of the foregoing Partial Motion to Dismiss Plaintiff’s Amended Complaint and Memorandum in Support to be sent via first-class mail, postage pre-paid, to:

Kenneth L. Allen
10055 E. Gray Hawk Dr.
Tucson, AZ 85730

October 5, 2009

s/ Brigham J. Bowen