UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHRISTOPHER EARL STRUNK, Plaintiff, v. U.S. DEPARTMENT OF STATE, U.S. DEPARTMENT OF HOMELAND SECURITY, Defendants.	Case No. 1:08-CV-02234 (RJL)

DEFENDANTS' CONSOLIDATED (1) REPLY IN SUPPORT OF DEFENDANTS' PARTIAL MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT; (2) OPPOSITION TO PLAINTIFF'S REQUESTS FOR NON-FOIA RELIEF; AND (3) MOTION FOR STAY OF DISCOVERY

Rather than attempt to defend his asserted (but false) entitlement to private passport and travel records relating to President Barack Obama, Plaintiff Christopher Strunk has responded to Defendants' Partial Motion to Dismiss [Dkt. #16] by requesting that his entire Freedom of Information Act ("FOIA") case be set aside, at least temporarily, in favor of jury proceedings regarding the President's authority to hold his office, with concomitant discovery on a wide range of issues, apparently to be heard by a three-judge panel under color of 28 U.S.C. § 2284. Pl.'s Opp'n/Cross-Mot. [Dkt. #19]. None of these requests have merit. As to the underlying Motion to Dismiss, Strunk concedes the solitary relevant issue by admitting that, in submitting his FOIA requests for the President's personal records, he failed to comply with agency privacy regulations, and therefore has not exhausted his claims for such records. Defendants' Partial Motion to Dismiss should therefore be granted. Moreover, Defendants hereby (1) oppose Strunk's myriad requests for relief, all of which are meritless and fall well beyond the scope of

the FOIA complaint in this action; and (2) request immediate entry of a stay of discovery pending resolution of the motion to dismiss.

I. BACKGROUND

As set forth more fully in Defendants' Partial Motion to Dismiss, this case arises from three FOIA requests submitted by Strunk to the U.S. Department of State ("DOS") and the U.S. Department of Homeland Security ("DHS"). By these requests, Strunk seeks passport and travel records pertaining to President Obama and to his mother, Stanley Ann Dunham. The Obama records are not subject to release because Strunk has failed to obtain privacy waivers, which are required by regulation. The Dunham records are, however, subject to release, because Ms. Dunham is deceased; DHS has released responsive Dunham travel records to Strunk and DOS is currently processing Strunk's request for Dunham passport applications.

Because Strunk has failed to obtain the necessary waiver regarding the Obama records, Defendants moved to dismiss this action as to the President and separately filed an answer regarding the allegations concerning the Dunham records. Strunk has responded by requesting that his entire action under FOIA be set aside in favor of completely novel proceedings, apparently to be conducted pursuant *both* to D.C. Code *quo warranto* provisions (*see* D.C. Code §§ 16-3501 to 3503) and to 28 U.S.C. § 2284 (a statute providing for three-judge panels in legislative apportionment cases and when required by Act of Congress). He also seeks discovery into a wide range of issues relating to the President's birth and citizenship.[1] In addition, Strunk

[1] Strunk's allegations appear to be grounded in a widely discredited conspiracy theory asserting that the President was not born in the United States and/or is otherwise not a United States citizen. As recently observed by Judge James Robertson, this theory was "raised, vetted, blogged, texted, twittered, and otherwise massaged by America's vigilant citizenry during Mr. Obama's two-year-campaign for the presidency," *Hollister v. Soetoro,* 601 F. Supp. 2d 179, 180

has filed a voluminous document in the D.C. Circuit, which appears to request, *inter alia*, the recusal of Judge Leon either from this proceeding, or from a yet-to-be-filed census-related action, or both. *See In re: Strunk*, No. 08-5503, Mot. for Restoration of the Pet. for Mandamus (May 12, 2009).[2] This appellate filing remains pending.

II. ARGUMENT

A. Claims Regarding President Obama Must Be Dismissed.

Dismissal of all claims concerning President Obama is manifestly warranted. The FOIA

(D.D.C. 2009), and yet it has still been the subject of numerous — and fruitless — lawsuits across the country, *see, e.g.*, *Craig v. United States*, No. 09-cv-343 (W.D. Okla. Apr. 16, 2009) (dismissing Obama citizenship case for failure to state a claim and for lack of subject matter jurisdiction); *Essek v. Obama*, No. 08-379 (E.D. Ky. Jan. 15, 2009) (dismissing case regarding Obama for lack of standing and jurisdiction); *Cohen v. Obama*, No. 08-cv-2150, 2008 WL 5191864, at *1 (D.D.C. Dec. 11, 2008) (dismissing suit regarding Obama on standing grounds); *Roy v. Federal Election*, No. 08-1480, 2008 WL 4921263, at *1 (W.D. Wash. Nov. 14, 2008) (dismissing suit regarding Obama and McCain for failure to state a claim); *Stamper v. United States*, No. 08-cv-2593, 2008 WL 4838073, at *2 (N.D. Ohio Nov. 4, 2008) (dismissing suit regarding Obama and John McCain for lack of jurisdiction); *Wrotnowski v. Bysiewicz*, 958 A.2d 709, 713 (Conn. 2008) (dismissing case regarding Obama for lack of statutory standing and subject matter jurisdiction); *Marquis v. Reed*, Superior Court Case No. 08-2-34955 SEA (Wash. 2008) (dismissing suit regarding Obama); *Lightfoot v. Bowen*, Supreme Court Case No. S168690 (Cal. 2008) (Original Proceeding) (denying Petition for Writ of Mandate/Prohibition and Stay regarding Obama); *Constitution Party v. Lingle*, No. 29473, 2008 WL 5125984, at *1 (Haw. Dec. 5, 2008) (unpublished) (dismissing election contest challenging Obama's Nov. 4, 2008 victory); *Martin v. Lingle*, Supreme Court Case No. 08-1-2147 (Haw. 2008) (Original Proceeding) (rejecting original writ petition regarding Obama on several grounds); *Donofrio v. Wells*, 129 S. Ct. 752, 2008 WL 5115737 (U.S. Dec. 8, 2008) (declining to hear Obama citizenship appeal from New Jersey state court case).

[2] Prior to the docketing of the initial Complaint in this action, Strunk filed a petition for mandamus relief in the D.C. Circuit, seeking to have his *in forma pauperis* petition expedited. *See generally In re: Strunk*, No. 08-5503 (D.C. Cir.). The D.C. Circuit dismissed the petition *sua sponte* on January 8, 2009, on the ground that Strunk's Complaint had been docketed in this action, rendering his mandamus petition moot. The new motion was filed on the docket of this prior proceeding.

requires that records requests made pursuant to its provisions be "made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed," 5 U.S.C. § 552(a)(3)(A), and "[f]ailure to comply with agency FOIA regulations amounts to a failure to exhaust administrative remedies, which warrants dismissal," *Dale v. IRS*, 238 F. Supp. 2d 99, 103 (D.D.C. 2002); *see also Stebbins v. Nationwide Mutual Ins. Co.*, 757 F.2d 364, 366 (D.C. Cir. 1985) ("Exhaustion of [administrative] remedies is required under the Freedom of Information Act before a party can seek judicial review."); *West v. Jackson*, 448 F. Supp. 2d 207, 211 (D.D.C. 2006) ("A requester must comply with an agency's published regulations for filing a proper FOIA request.").

It is beyond dispute — and it is now conceded — that Plaintiff has failed to comply with DHS and DOS regulations in seeking records concerning the President. *See* 22 C.F.R. § 171.12(a) (DOS) ("[R]equests for records pertaining to another individual shall be processed under the FOIA and must be accompanied by a written authorization for access by the individual, notarized or made under penalty of perjury, or by proof that the individual is deceased (e.g., death certificate or obituary)."); 6 C.F.R. § 5.3 (DHS) ("If you are making a request for records about another individual, either a written authorization signed by that individual permitting disclosure of those records to you or proof that that individual is deceased (for example, a copy of a death certificate or an obituary) must be submitted."), § 5.21(f) (DHS) ("If you are making a request for records concerning an individual on behalf of that individual, you must provide a statement from the individual verifying the identity of the individual as provided in paragraph (d) of this section. You must also provide a statement from the individual certifying the individual's agreement that records concerning the individual may be released to

you."). As Strunk admits, the President "has not provided permission to release documents." Strunk Aff. [Dkt. #19] ¶ 20. Absent the appropriate waivers, Strunk's FOIA requests for private records relating to President Obama are not perfected, and his claims for these records must be dismissed. *See Pusa v. FBI*, No. 99-04603, slip op. at 5-6 (C.D. Cal. Aug. 3, 1999) (dismissing case because plaintiff did not comply with agency regulations concerning third-party requests); *Harvey v. U.S. Dep't of Justice*, No. CV 92-176, slip op. at 17-18 (D. Mont. Jan. 9, 1996) (declining to grant motion for production of third-party records because plaintiff failed to submit authorization at the administrative level), *aff'd on other grounds*, 116 F.3d 484 (9th Cir. June 3, 1997) (unpublished table decision); *Freedom Magazine v. IRS*, No. 91-4536, 1992 U.S. Dist. LEXIS 18099, at *10-13 (C.D. Cal. Nov. 13, 1992) (finding that court lacked jurisdiction when, prior to filing suit, plaintiff failed to provide waivers for third-party records as required by IRS regulations).

B. Plaintiff's Request For *Quo Warranto* Proceedings And Other Relief Must Be Denied.

Strunk's attempts to transform this action into a jury trial regarding the President's citizenship merit no consideration, for a host of reasons. First, even assuming the D.C. Code provisions upon which Strunk relies in requesting *quo warranto* proceedings[3] could be applied to

[3] Statutory *quo warranto* ("by what authority") provisions have roots in an ancient writ used by the King of England to inquire into the authority by which a public office is claimed. *See U.S. ex rel. State of Wisconsin v. First Fed. Sav. and Loan Ass'n*, 248 F.2d 804, 807-08 (7th Cir. 1957), *cert. denied*, 355 U.S. 957 (1958). "[E]xcept as otherwise specifically provided by statute, that there is no original jurisdiction in the federal district court to entertain an information in the nature of quo warranto." 248 F.3d at 809; *see also* 3 Roger Foster, A Treatise on Federal Practice § 468a (6th ed. 1921) (observing that "the District Courts of the United States have original jurisdiction to grant the writ of *quo warranto* only when specifically authorized by statute").

subject a sitting, duly elected President's claim to office to judicial review — which is doubtful (*see* 3 Roger Foster, A Treatise on Federal Practice § 468a (6th ed. 1921) (observing that "no writ of *quo warranto* can issue from [the district courts] to try the title to the office of President of the United States")) — Strunk does not satisfy the statutory criteria for requesting such proceedings. These statutes give authority only to the Attorney General or to the U.S. Attorney for the District of Columbia to institute proceedings, on their own volition or "on the relation of a third person." D.C. Code § 16-3502. The one narrow exception, allowing private parties to directly "apply to the court by certified petition for leave to have the writ issued," is limited to "interested person[s]" (as opposed to merely "third persons"), and it only applies when "the Attorney General or United States attorney refuses to institute a quo warranto proceeding on the request of a person interested." *Id.* § 16-3503.

As used in the statute, the terms "third person" (as used in § 16-3502) and "interested person" (as used in § 16-3503) carry specific, different meanings. In *Newman v. United States ex rel. Frizzell*, 238 U.S. 537 (1915), the U.S. Supreme Court reviewed the predecessor D.C. *quo warranto* statute (the language of which is substantially identical to the statute relied upon by Strunk here),[4] and held that "Congress used the words 'third person' in the sense of 'any person,'

[4] The predecessor statute provided:

> Sec. 1538. AGAINST WHOM ISSUED. — A quo warranto may be issued from the supreme court of the District in the name of the United States —
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> First. Against a person who usurps, intrudes into, or unlawfully holds or exercises within the District a franchise or public office, civil or military, or an office in any domestic corporation.
>
> Second. Against any one or more persons who act as a corporation within the District without being duly authorized, or exercise within the District any corporate rights, privileges, or franchises not granted them by the laws in force in said District. And said proceedings shall be deemed a civil action.

and the phrase 'person interested' in the sense in which it so often occurs in the law, prohibiting a judge from presiding in a case in which he is interested; preventing a juror from sitting in a case in which he is interested; and permitting interested persons to institute quo warranto proceedings." *Id.* at 549-50. Put more directly, "[t]he interest which will justify such a proceeding by a private individual must be more than that of another taxpayer. It must be 'an interest in the office itself, and must be peculiar to the applicant.'" *Id.* at 550.[5]

Naturally, Mr. Strunk cannot claim such an interest and his request must therefore be denied. In any event, even assuming Strunk can claim to be an "interested person," the Court has broad discretion, under § 16-3503, to deny a *quo warranto* petition request, and Defendants

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> Sec. 1539. WHO MAY INSTITUTE. — The Attorney General or the district attorney may institute such proceeding on his own motion, or on the relation of a third person. But such writ shall not be issued on the relation of a third person, except by leave of the court, to be applied for by the relator, by a petition duly verified, setting forth the grounds of the application, or until the relator shall file a bond with sufficient surety, to be approved by the clerk of the court, in such penalty as the court may prescribe, conditioned for the payment by him of all costs incurred in the prosecution of the writ in case the same shall not be recovered from and paid by the defendant.
>
> Sec. 1540. IF ATTORNEY GENERAL AND DISTRICT ATTORNEY REFUSE. — If the Attorney General and district attorney shall refuse to institute such proceeding on the request of a person interested, such person may apply to the court by verified petition for leave to have said writ issued, and if in the opinion of the court the reasons set forth in said petition are sufficient in law, the said writ shall be allowed to be issued by any attorney, in the name of the United States, on the relation of said interested person, on his compliance with the condition prescribed in the last section as to security for costs.

D.C. Code Ch. LI, Quo Warranto, §§ 1538-40 (1911).

[5] Elaborating on this holding, the Court observed that "one who has no interest except that which is common to every other member of the public is not entitled to use the name of the government in quo warranto proceedings," and added, "[m]anifestly, Congress did not intend that all these officers attached to the executive branch of the government at Washington should be subject to attacks by persons who had no claim on the office, no right in the office, and no interest which was different from that of every other citizen and taxpayer of the United States." *Id.* at 551-552.

respectfully suggest that the Court exercise its discretion by declining to indulge Strunk's wishes for a conspiratorial inquest into the President's claim to office. Indulging this plaintiff is especially unwarranted here, where the request comes via an attempt to transform, by simple motion, a straightforward FOIA suit into a full-blown jury trial on matters far exceeding the FOIA's reach.[6]

Nor does Strunk's desire for "a decision rendered by a three judge panel" warrant consideration. Pl.'s Mem. of Law [Dkt. # 19] at 2 (requesting such a panel "with 28 U.S.C. § 2284, that needs to be expedited so were the decision appealed to SCOTUS, would save time without involving the DC Circuit"). Pursuant to 28 U.S.C. § 2284(a), three-judge panels are convened only when "required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." Plainly, these conditions are not met in this FOIA suit.

C. Defendants Request A Stay Of Discovery Pending Resolution Of Defendants' Motion To Dismiss.

Finally, Strunk has served government counsel with broad-reaching requests for admission, demanded to be answered personally by the Secretaries of DHS and DOS. (These requests are duplicated in full in Strunk's affidavit filed in support of his *quo warranto* jury trial request, and relate primarily to the Secretaries' personal abilities and alleged duties to make inquiries into the citizenship and birth of the President. *See* Strunk Aff. [Dkt. #19] ¶¶ 31-32.) Of

[6] Strunk also fails to clear numerous other hurdles established by these provisions, including providing proof that the Attorney General and U.S. Attorney have "refuse[d]" to institute proceedings, the filing of a separate civil action, and the filing of a bond "with sufficient surety" for the payment, by Strunk, of "all costs incurred in the prosecution of the writ if costs are not recovered from and paid by the defendant." D.C. Code §§ 16-3501 to 3503.

course, discovery is generally not permitted in FOIA actions, and on the rare occasion when it is allowed, its scope is constrained to inquiries regarding document indexing, classification, retrieval and like matters. *Wolf v. CIA*, 569 F. Supp. 2d 1, 9 (D.D.C. 2008) ("Discovery is generally unavailable in FOIA actions.") (quoting *Wheeler v. CIA*, 271 F. Supp. 2d 132, 139 (D.D.C. 2003)); *Voinche v. FBI*, 412 F. Supp. 2d 60, 71 (D.D.C. 2006) (FOIA discovery is rare and "is usually limited to the adequacy of the agency's search and similar matters"); *Schrecker v. U.S. Dep't of Justice*, 217 F. Supp. 2d 29, 35 (D.D.C. 2002) ("Discovery in FOIA is rare and should be denied where an agency's declarations are reasonably detailed, submitted in good faith and the court is satisfied that no factual dispute remains."). Even by the most generous of interpretations, the discovery sought by Strunk here far exceeds these strict limitations and should be subject to a protective order. Rather than moving for such an order immediately, however (and risk the possibility of additional efforts at inappropriate discovery by Plaintiff), Defendants hereby seek only the more narrow relief of a stay of discovery until the pending cross-motions have been resolved and a scheduling order governing the remaining portions of this action has been established. Staying discovery until resolution of pending motions will prevent unnecessary disputes over matters that ultimately may not be litigated at all, without prejudicing Plaintiff's ability to seek discovery, if any, once the scope of this action has more fully been determined by the Court.

III. CONCLUSION

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

Plaintiff's claims for mandamus relief should also be dismissed.[7] Moreover, Plaintiff's requests for jury proceedings, a three-judge panel, and other non-FOIA relief should be denied, and discovery should be stayed until the currently pending motions have been resolved.

Dated: June 8, 2009

Respectfully submitted,

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[7] Plaintiff's claim for mandamus relief must be dismissed, as mandamus is precluded by the remedial scheme provided by the FOIA. *Pickering-George v. Registration Unit, DEA/DOJ*, 553 F. Supp. 2d 3, 4 n.1 (D.D.C. 2008) ("The exclusive nature of the FOIA precludes mandamus relief."); *Kessler v. United States*, No. 94-402, 1994 WL 193940, at *1 (D.D.C. May 4, 1994) (writ of mandamus for release of records not available because remedies provided by the FOIA).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of June, 2009, a true and correct copy of the foregoing Consolidated Reply, Memorandum in Opposition, and Motion for Stay of Discovery was served upon Plaintiff by first class United States mail, postage prepaid marked for delivery to:

Christopher E. Strunk
593 Vanderbilt Ave., #281
Brooklyn, NY 11238

/s/ Brigham J. Bowen
Brigham J. Bowen