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6
7 **UNITED STATES DISTRICT COURT**
8 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
9 **SAN FRANCISCO DIVISION**

10
11 CORA CURRIER,

12 Plaintiff,

13 v.

14 DEPARTMENT OF HOMELAND SECURITY,
15 et al.,

16 Defendants.

)
)
) Case No. 3:17-cv-01799-JSC
)
)
)

17 **PLAINTIFF CORA CURRIER'S**
18 **REPLY IN SUPPORT OF MOTION FOR**
PRELIMINARY INJUNCTION

19 Date: August 24, 2017
20 Time: 9:00 a.m.
21 Place: Courtroom F, 15th Floor
22 Magistrate Judge Jacqueline Scott Corley
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TABLE OF CONTENTS

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

I. INTRODUCTION 1

II. ARGUMENT 1

 A. MS. CURRIER IS ENTITLED TO A PRELIMINARY INJUNCTION 2

 1. Ms. Currier is Likely to Prevail Upon the Merits of Her Claim That She is
 Entitled to Expedited Processing of Her Requests 2

 a. The FOIA Requires Agencies to Comply with Rigid Timelines
 Unless They Are Able to Show Exceptional Circumstances..... 2

 b. The Agencies Seeking Significantly More Time Have Not
 Demonstrated Exceptional Circumstances. 4

 c. *CREW* Does Not Hold That FOIA’s Timelines are Unenforceable. ... 6

 d. The *EPIC 2006* Line of Cases Remains Good Law. 8

 2. Ms. Currier Will Suffer Irreparable Injury in the Absence of the Requested
 Injunctive Relief 10

 3. The Balance of Equities Favors Ms. Currier 13

 4. The Public Interest Favors the Requested Relief 14

 B. THE COURT SHOULD ORDER DEFENDANTS TO PREPARE A *VAUGHN* INDEX TO HELP
 RESOLVE THE REMAINING ISSUES IN THIS CASE 14

III. CONCLUSION 15

TABLE OF AUTHORITIES

FEDERAL CASES

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

ACLU v. Dep’t of Defense,
339 F. Supp. 2d 501 (S.D.N.Y. 2004) 15

ACLU v. Dep’t of Justice,
321 F. Supp. 2d 24 (D.D.C. 2004) 13

Allied Progress v. CFPB,
No. 17-cv-686, 2017 WL 1750263 (D.D.C. May 4, 2017)..... 12

Brown v. CBP,
132 F. Supp. 3d 1170 (N.D. Cal. 2015) 7

Citizens for Responsibility and Ethics in Washington v. FEC,
711 F.3d 180 (D.C. Cir. 2013) *passim*

Clemente v. FBI,
71 F. Supp. 3d 262 (D.D.C. 2014) 8

Daily Caller v. Dep’t of State,
152 F. Supp. 3d 1 (D.D.C. 2015) 9, 12

Elec. Frontier Found. v. Office of Dir. of Nat. Intelligence,
No. C 07-5278 SI, 2007 WL 4208311 (N.D. Cal. Nov. 27, 2007) 10, 13

Elec. Frontier Found. v. Office of the Dir. of Nat. Intelligence,
542 F. Supp. 2d 1181 (N.D. Cal. 2008) 10, 13

Elec. Privacy Info. Ctr. v. Dep’t of Justice,
15 F. Supp. 3d 32 (D.D.C. 2014) 9, 12

Elec. Privacy Info. Ctr. v. Dep’t of Justice,
416 F. Supp. 2d 30 (D.D.C. 2006) *passim*

Elec. Privacy Info. Ctr. v. Presidential Advisory Comm. on Election Integrity,
No. 17-cv-1320, 2017 WL 3141907 (D.D.C. July 24, 2017) 8

Exner v. FBI,
542 F.2d 1121 (9th Cir. 1976) 3

Fiduccia v. Dep’t of Justice,
185 F.3d 1035 (9th Cir. 1999) 6

1
2 *Gilmore v. Dep’t of Energy*,
3 33 F. Supp. 2d 1184 (N.D. Cal. 1998) 4
4
5 *Griffin v. Oceanic Contractors, Inc.*,
6 458 U.S. 564 (1982)..... 11
7
8 *Judicial Watch, Inc. v. Dep’t of Energy*,
9 191 F. Supp. 2d 138 (D.D.C. 2002) 15
10
11 *Judicial Watch, Inc. v. Dep’t of Homeland Security*,
12 514 F. Supp. 2d 7 (D.D.C. 2007) 12
13
14 *Judicial Watch, Inc. v. Dep’t of Justice*,
15 774 F. Supp. 2d 225 (D.D.C. 2011) 9
16
17 *Leadership Conference on Civil Rights v. Gonzales*,
18 404 F. Supp. 2d 246 (D.D.C. 2005) 13
19
20 *Long v. IRS*,
21 693 F.2d 907 (9th Cir. 1982) 15
22
23 *Martins v. U.S. Citizenship & Immigration Servs.*,
24 962 F. Supp. 2d 1106 (N.D. Cal. 2013) 9
25
26 *NAACP Legal Defense & Ed. Fund, Inc. v. U.S. Dep’t of Housing & Urban Dev.*,
27 No. 07 Civ. 3378, 2007 WL 4233008 (S.D.N.Y. Nov. 30, 2007) 9
28
Natural Resources Defense Council v. Dep’t of Energy,
191 F. Supp. 2d 41 (D.D.C. 2002) 14, 15

Open America v. Watergate Special Prosecution Force,
547 F.2d 605 (D.C. Cir. 1976) 3

Our Children’s Earth Foundation v. Nat’l Marine Fisheries Serv.,
85 F. Supp. 3d 1074 (N.D. Cal. 2015) 6, 7, 9

Payne Enters., Inc. v. United States,
837 F.2d 486 (D.C. Cir. 1988) 2, 15

Protect Democracy Project, Inc. v. Dep’t of Defense,
No. 17–cv–00842, 2017 WL 2992076 (D.D.C. July 13, 2017) 8, 13, 14

South Yuba River Citizens League v. Nat’l Marine Fisheries Serv.,
No. Civ. S-06-2845, 2008 WL 2523829 (E.D. Cal. 2008) 9

Treatment Action Group v. Food & Drug Admin.,
No. 15-cv-976, 2016 WL 5171987 (D. Conn. Sept. 20, 2016) 8

1
2
3
4
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6
7
8
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10
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21
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23
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25
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28

Trump v. Int’l Refugee Assistance Project,
 ___ U.S. ___, 137 S. Ct. 2080 (2017) (per curiam)..... 1

Vaughn v. Rosen,
 484 F.2d 820 (D.C. Cir. 1973)..... 15

Weiner v. FBI,
 943 F.2d 972 (9th Cir. 1991) 15

FEDERAL STATUTES

5 U.S.C. § 552.....*passim*

5 U.S.C. § 552(a)(3)(A) 7

5 U.S.C. § 552(a)(4)(A)(viii)(II)(cc)..... 3, 4, 9

5 U.S.C. § 552(a)(6)(A)(i) 2

5 U.S.C. § 552(a)(6)(B)(i)..... 3

5 U.S.C. § 552(a)(6)(B)(iii) 3

5 U.S.C. § 552(a)(6)(C)(i)..... 2, 3, 7

5 U.S.C. § 552(a)(6)(C)(ii) 3, 5

5 U.S.C. § 552(a)(6)(E)(iii)..... 2

FOIA Improvement Act, Pub. L. No. 114-185, 130 Stat. 539 (2016) 3

LEGISLATIVE MATERIALS

H. Rep. No. 876, 93rd Cong. 2d Sess. (1974)..... 4

S. Rep. No. 104-272 (1996)..... 2

OTHER AUTHORITIES

Supreme Court Argument Calendar October 2017 (July 17, 2017) 11

II. INTRODUCTION

In this action under the Freedom of Information Act (“FOIA”), Plaintiff Cora Currier seeks the entry of a preliminary injunction requiring Defendants Department of Homeland Security, Department of Justice, Department of State, and Department of Defense to disclose information by September 5, 2017 relevant to President Trump’s effort to prevent nationals from several Muslim-majority countries from entering the United States. The travel ban is a matter of significant national debate and the Supreme Court has granted certiorari to review its legality. *Trump v. Int’l Refugee Assistance Project*, ___ U.S. ___, 137 S. Ct. 2080, 2089 (2017) (per curiam). Defendants have now each issued interim responses to Ms. Currier’s requests—one response the day before this motion was filed, the others since then. But several agencies and components remain unable to provide an anticipated date for the completion of processing and release of documents.

The FOIA requires federal agencies to process expedited requests “as soon as practicable,” but Defendants have violated the statute’s time limits for even non-expedited requests. They are not permitted more time without demonstrating exceptional circumstances and due diligence to the Court. They have failed to meet that burden. The Court should order Defendants to process Ms. Currier’s requests immediately.

III. ARGUMENT

When Congress passed the FOIA, it crafted a framework generally requiring agencies to meet time limits for processing requests, with safety valves for agencies that are not able to meet those time limits due to certain circumstances. Defendants parse the language of the statute to argue that they are not required to meet any time limit. But Congress meant what it said. By default, agencies must process requests within 20 business days and “promptly” release responsive records unless unusual or exceptional circumstances exist. Requests that are expedited must be processed “as soon as practicable,” which logically must mean something faster than the default time limit.

Defendants lean heavily on D.C. Circuit precedent to argue that an agency is not bound to follow the FOIA’s deadlines. *Citizens for Responsibility and Ethics in Washington v. FEC*, 711 F.3d 180 (D.C. Cir. 2013) (“*CREW*”). But *CREW* holds only that when an agency fails to make a

1 “determination” on a FOIA request within the statutory timeline, it cannot invoke an administrative
2 exhaustion argument to keep a lawsuit out of court. *Id.* at 189–90. Once a requester is in court, the
3 FOIA “imposes no limits on courts’ equitable powers in enforcing its terms.” *Payne Enters., Inc. v.*
4 *United States*, 837 F.2d 486, 494 (D.C. Cir. 1988). A court can fashion the relief it deems
5 appropriate under the circumstances.

6 **A. Ms. Currier is Entitled to a Preliminary Injunction**

7
8 **1. Ms. Currier is Likely to Prevail Upon the Merits of Her Claim That She
Is Entitled to Expedited Processing of Her Requests**

9 Defendants are in violation of the FOIA’s time limits. The D.C. Circuit’s holding in *CREW*
10 does not suggest otherwise.

11 *a. The FOIA Requires Agencies to Comply with Rigid Timelines Unless
They Are Able to Show Exceptional Circumstances.*

12 Defendants strain the plain language of the FOIA to blur the statute’s timing requirements.
13 Opp. 3-5. The FOIA requires an agency to “determine within 20 [business] days” after receiving a
14 FOIA request whether to comply with it and to “immediately notify” the requester of “such
15 determination and reasons therefor[.]” 5 U.S.C. § 552(a)(6)(A)(i). When an agency makes a
16 determination to comply, “the records shall be made promptly available to such person making
17 such request.” *Id.* § 552(a)(6)(C)(i). In other words, the FOIA requires an agency to process a
18 request within 20 days and make the records available quickly.

19 When a request is granted expedited treatment, it is to be processed “as soon as
20 practicable.” *Id.* § 552(a)(6)(E)(iii). In other words, as the legislative history explains, “The goal is
21 not to get the request processed within a specific time frame, but to give the request *priority for*
22 *processing more quickly than otherwise would occur.*” S. Rep. No. 104-272, at 17 (1996)
23 (emphasis added). The FOIA provides that processing “otherwise would occur” within 20 days
24 under 5 U.S.C. § 552(a)(6)(A)(i).

25 Congress did create two safety valves to permit an agency more processing time in limited
26 situations. Where “unusual circumstances” exist, an agency is permitted to extend the standard 20-
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1 day deadline—but no more than 10 days. 5 U.S.C. § 552(a)(6)(B)(i).¹ And where an agency fails to
2 comply with the FOIA’s time limits, but “exceptional circumstances” exist and the agency is
3 “exercising due diligence,” a court may “retain jurisdiction and allow the agency additional time to
4 complete its review of the records.” *Id.* at § 552(a)(6)(C)(i). Congress amended the FOIA last year
5 to clarify that an agency’s failure is only “excused for the length of time provided by court order.”
6 *Id.* at § 552(a)(4)(A)(viii)(II)(cc).²

7 “Exceptional circumstances” do not include “a delay that results from a predictable agency
8 workload of requests under this section, unless the agency demonstrates reasonable progress in
9 reducing its backlog of pending requests.” 5 U.S.C. § 552(a)(6)(C)(ii). In *Open America v.*
10 *Watergate Special Prosecution Force*, the D.C. Circuit construed “exceptional circumstances” to
11 mean:

12 when an agency . . . is deluged with a volume of requests for information vastly in
13 excess of that anticipated by Congress, when the existing resources are inadequate
14 to deal with the volume of such requests within the time limits of subsection
15 (6)(A), and when the agency can show that it “is exercising due diligence” in
16 processing the requests.

17 547 F.2d 605, 616 (D.C. Cir. 1976). The Ninth Circuit has adopted a limited version of the holding
18 in *Open America* that permits an agency to claim exceptional circumstances when it is faced with
19 an unforeseen and unforeseeable increase in the number of FOIA requests. *Exner v. FBI*, 542 F.2d
20 1121, 1123 (9th Cir. 1976).

21 Together, these provisions show that Congress intended to create a framework in which
22 agencies must process requests and make determinations within 20 days by default and “promptly”
23 release responsive records. Expedited requests are to be processed “as soon as practicable,” which
24 means they are given priority to be processed more quickly than the default 20 days. An agency

25 ¹ “Unusual circumstances” is defined as “(I) the need to search for and collect the requested records
26 from field facilities or other establishments that are separate from the office processing the request;
27 (II) the need to search for, collect, and appropriately examine a voluminous amount of separate and
28 distinct records which are demanded in a single request; or (III) the need for consultation, which
shall be conducted with all practicable speed, with another agency having a substantial interest in
the determination of the request or among two or more components of the agency having
substantial subject-matter interest therein.” 5 U.S.C. § 552(a)(6)(B)(iii).

² This language was added by the FOIA Improvement Act, Pub. L. No. 114-185, 130 Stat. 539
(2016).

1 can unilaterally extend the default deadline by up to 10 days in limited circumstances, and a court
2 may choose to give an agency additional processing time in other limited circumstances.

3 This regime is consistent with the legislative history, which said, “information is often
4 useful only if it is timely. Thus, excessive delay by the agency in its response is often tantamount to
5 denial. It is the intent of this bill that the affected agencies be required to respond to inquiries and
6 administrative appeals *within specific time limits.*” H. Rep. No. 876, 93rd Cong. 2d Sess. (1974);
7 *see also Gilmore v. Dep’t of Energy*, 33 F. Supp. 2d 1184, 1187 (N.D. Cal. 1998) (discussing
8 FOIA’s legislative background).

9
10 *b. The Agencies Seeking Significantly More Time Have Not
Demonstrated Exceptional Circumstances.*

11 In the declarations accompanying the Defendants’ opposition, some agency components
12 have now proposed to process documents by September 5, (Defs. Ex. C ¶ 7 (FBI); Ex. D ¶ 5
13 (EOUSA)), or at least on a rolling basis (Defs. Ex. G ¶¶ 13-15 (DOS); Ex. H ¶¶ 22-32 (DOD);
14 Ex. I ¶¶ 14-17 (DHS-PRIV); Ex. J ¶¶ 21-31 (CBP)).³ These are positive developments. But OIP
15 says it requires an additional four months to finish processing Ms. Currier’s requests (Defs. Ex. E
16 ¶ 30) and other agencies cannot project a final completion date at all (Defs. Ex. F ¶¶ 24-33(OLC);
17 Ex. G ¶¶ 33-35 (DOS); Ex. H ¶ 33 (DOD); Ex. I ¶¶ 14-23 (DHS-PRIV); Ex. J ¶¶ 21-31 (CBP)).
18 Under the FOIA, these agencies are only permitted more time if the Court determines that
19 exceptional circumstances exist and extends their deadlines by court order. 5 U.S.C.
20 § 552(a)(4)(A)(viii)(II)(cc).

21 Ms. Currier appreciates the difficulties inherent in FOIA processing and recognizes that
22 recent national events have prompted a wave of FOIA requests to the federal government. But the
23 Defendants have not carried their burden of showing exceptional circumstances and due diligence,
24 particularly the components seeking open-ended processing deadlines.

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28 ³ Defendants suggest that Ms. Currier erroneously directed her FOIA requests to the Privacy Office
at DHS Headquarters rather than to CBP and OIG directly. Opp. at 5 & 6 n.4. Ms. Currier’s
requests to DHS were submitted this way at the suggestion of former DHS Chief Privacy Officer
and Chief Freedom of Information Officer Mary Ellen Callahan. @MECPrivacy, Twitter (Jan. 29,
2017, 12:30 PM), <https://twitter.com/MECPrivacy/status/825803658650595328>.

1 For example, the State Department explains that while the number of FOIA requests it has
2 received annually since 2008 had increased by more than 350% as of 2016, its funding has
3 remained relatively consistent with a small increase in resources just last year. Defs. Ex. G ¶ 20.
4 Yet the agency's FOIA review staff, most of whom are part-time, has decreased recently and is
5 likely to continue doing so. Defs. Ex. G ¶ 31. The agency is overburdened and is not making
6 progress in reducing its backlog, Defs. Ex. G ¶¶ 26 & 28, which makes it unlikely to meet the
7 "exceptional circumstances" standard. 5 U.S.C. § 552(a)(6)(C)(ii). The FOIA office is willing to
8 assign one reviewer to work on Ms. Currier's request, and anticipates that this person will review
9 300 pages a month, which is an average of 15 pages per work day. Defs. Ex. G ¶ 15. The agency
10 has no projected date to complete processing. Defs. Ex. G ¶¶ 33-35. It is difficult to understand
11 how the agency is processing Ms. Currier's requests "as soon as practicable."

12 OLC explains that one attorney is primarily responsible for all agency FOIA compliance.
13 Defs. Ex. F ¶ 9. The agency is not making progress in reducing its backlog. Defs. Ex. F ¶ 11. There
14 is significant overlap between Ms. Currier's requests and many others currently pending, Defs.
15 Ex. F ¶¶ 25-29, so processing efforts should serve a large group of requesters. Yet OLC has not
16 committed to even rolling releases, much less an eventual date to complete processing. Defs. Ex. F
17 ¶ 33.

18 DOD says that a team of one full-time employee and four or five contractors has been
19 assigned to handle Ms. Currier's request and twelve other FOIA litigation matters. Defs. Ex. H
20 ¶¶ 10 & 12. The offices tasked to search for documents have identified a relatively small number of
21 potentially responsive pages, Defs. Ex. H ¶¶ 27 & 30, though additional searches are required Defs.
22 Ex. H ¶ 27. The agency offers some time estimates for discrete offices ranging from two to three
23 months, Defs. Ex. H ¶¶ 29-31, but it ultimately "cannot provide an accurate estimate on when DoD
24 likely will be able to complete its processing of Plaintiff's request." Defs. Ex. H ¶ 33.

25 The DHS Privacy Office and CBP report that they have also received many FOIA requests
26 that overlap with Ms. Currier's requests, Defs. Ex. I ¶ 12 & Ex. J ¶ 4. The DHS Privacy Office has
27 identified approximately 3,000 pages as potentially responsive to Ms. Currier's February 1 request,
28 and has not completed the search for records responsive to the April request. Defs. Ex. I ¶¶ 15 &

1 16. The agency is willing to process 500 pages a month, Defs. Ex. I ¶ 17, which is an average of 25
2 pages a day. At that rate, it could take another six months to process the February 1 request alone.
3 CBP projects that it may have as many as 125,000 records related to the implementation of
4 Executive Order 12769, and offers no estimate about records pertaining to Executive Order 13780.
5 Defs. Ex. I ¶ 5. Neither the DHS Privacy Office nor CBP has a projected date to complete
6 processing.

7 The agencies are unquestionably burdened by the amount of FOIA requests that they
8 receive. But that has long been so. “Although the Court and many others have recognized that
9 agencies’ resources are heavily taxed by the quantity and depth of FOIA requests, that does not
10 grant the agency carte blanche to repeatedly violate congressionally mandated deadlines.” *Our*
11 *Children’s Earth Foundation v. Nat’l Marine Fisheries Serv.*, 85 F. Supp. 3d 1074, 1090-91 (N.D.
12 Cal. 2015). As the Ninth Circuit has found in holding that difficulties of the kind Defendants cite
13 here may not be invoked to justify FOIA processing delays:

14 Though FOIA doubtless poses practical difficulties for federal agencies, federal
15 agencies can educate Congress on the practical problems they have, and attempt
16 to persuade Congress to change the law or provide additional funds to achieve
17 compliance. So long as the Freedom of Information Act is the law, we cannot
18 repeal it by a construction that vitiates any practical utility it may have. . . . It may
19 be that agency heads, such as the Attorney General in this case, can be forced by
20 the Freedom of Information Act to divert staff from programs they think more
valuable to Freedom of Information Act compliance But these policy
concerns are legislative, not judicial, and we intimate no views on them. Congress
wrote a tough statute on agency delay in FOIA compliance, and recently made it
tougher.

21 *Fiduccia v. Dep’t of Justice*, 185 F.3d 1035, 1041 (9th Cir. 1999). The “tough statute” that
22 Congress enacted does not permit open-ended delays in processing material responsive to
23 “expedited” FOIA requests. Defendants are in violation of the law and are not entitled to an
24 indefinite amount of time.

25 *c. CREW Does Not Hold That FOIA’s Timelines are Unenforceable.*

26 Defendants argue that *CREW* stands for the proposition that the only legal consequence of
27 an agency’s failure to follow the FOIA’s deadlines is that a FOIA requester may file suit without
28 first exhausting administrative remedies. Opp. at 12. In other FOIA litigation, this Court has found

1 that argument “tantamount to a willful misreading of *CREW*.” *Brown v. CBP*, 132 F. Supp. 3d
2 1170, 1173 (N.D. Cal. 2015).

3 The question before the D.C. Circuit in *CREW* was whether a FOIA requester must exhaust
4 administrative appeal remedies before filing suit. 711 F.3d at 184. The D.C. Circuit held that that
5 when an agency does not make a “determination” whether to comply with a FOIA request within
6 the statutory timeline, it cannot invoke an administrative exhaustion argument to keep a lawsuit out
7 of court. *Id.* at 189–90; *Our Children’s Earth Found.*, 85 F. Supp. 3d at 1089 (*CREW* addresses
8 only the question of when a FOIA requester can sue). Once a requester *is* in court, *CREW*’s holding
9 has no impact on whether a court may “exercise its discretionary authority to issue a judgment
10 declaring that the agency has, in fact, violated the statutory timeline.” *Our Children’s Earth*
11 *Found.*, 85 F. Supp. 3d at 1090 (issuing declaratory judgment that agency failed to comply with
12 statutory time limits).

13 Defendants also contend that *CREW* “made clear that the 20-day deadline under FOIA is
14 *not* a deadline for release of records.” *Opp.* at 11 (emphasis in original). But that is not what the
15 D.C. Circuit said. Specifically, the court found that an agency makes a “determination” for
16 purposes of the FOIA when it, at a minimum, “(i) gather[s] and review[s] the documents; (ii)
17 determine[s] and communicate[s] the scope of the documents it intends to produce and withhold;
18 and (iii) inform[s] the requester that it can appeal whatever portion of the ‘determination’ is
19 adverse.” 711 F.3d at 188. In dicta, the D.C. Circuit said an agency does not have to produce
20 records “at the exact same time” as it makes a determination, but must make nonexempt records
21 “‘promptly available,’ which depending on the circumstances typically would mean within days or
22 a few weeks of the ‘determination,’ *not months or years.*” *Id.*, citing 5 U.S.C. § 552(a)(3)(A),
23 (a)(6)(C)(i) (emphasis added).

24 By September 5, Ms. Currier’s February 1 and April 3 requests will have been pending for
25 over seven months and five months, respectively. Even assuming *CREW* is correct that the FOIA
26 permits an agency to produce records “within days or a few weeks” after a determination, the
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1 Defendants have failed to meet that standard.⁴ No agency issued a “determination” as defined by
2 *CREW* or produced documents within 20 days or “promptly” thereafter. And while DHS Privacy
3 did invoke the “unusual circumstances” extension, *see* Hofmann Decl. Exs. 5 & 16, the agency did
4 not issue a determination or produce documents within the extra 10-day period. At the time this
5 lawsuit was filed, the agencies had not made determinations nor produced records. And while each
6 agency has now made interim productions—nearly all after the instant motion was filed—final
7 determinations still have not been made by most components. The declarations submitted by
8 Defendants show that several components have not finished the process of gathering and reviewing
9 responsive records. Defs. Ex. C ¶ 6 (FBI); Ex. D ¶ 4 (EOUSA); Ex. E ¶ 27 (OIP); Ex. F ¶¶ 30-31
10 (OLC); Ex. H ¶¶ 22-23, 29-33(DOD); Ex. I ¶¶ 15-16 (DHS-PRIV); (Ex. J ¶¶ 24-27 (CBP). And
11 some agencies have neither determined nor communicated the scope of the documents they intend
12 to produce and withhold. Defs. Ex. C ¶ 7 (FBI); Ex. D ¶ 5 (EOUSA); Ex. E Decl. ¶ 27 (OIP); Ex. F
13 ¶¶ 30-31 (OLC); Ex. H ¶ 33 (DOD); Ex. I ¶ 16 (DHS-PRIV); (Ex. J ¶ 24-27 (CBP). Ms. Currier
14 does appreciate the Defendants’ efforts to take steps toward processing her requests, but the
15 agencies still have not met the *CREW* standard for issuing a determination or producing records in
16 a timely manner.

17 *d. The EPIC 2006 Line of Cases Remains Good Law.*

18 Defendants characterize *Elec. Privacy Info. Ctr. v. Dep’t of Justice*, 416 F. Supp. 2d 30
19 (D.D.C. 2006) (“*EPIC 2006*”) as “outdated” and “cast into doubt nearly at its inception.” Opp. at
20 13 & n.9. Yet courts throughout the country continue to cite it approvingly and rely on its analysis.
21 *See, e.g., Elec. Privacy Info. Ctr. v. Presidential Advisory Comm. on Election Integrity*, No. 17-cv-
22 1320, 2017 WL 3141907, at *13 (D.D.C. July 24, 2017); *Protect Democracy Project, Inc. v. Dep’t*
23 *of Defense*, No. 17-cv-00842, 2017 WL 2992076, at *4 (D.D.C. July 13, 2017); *Treatment Action*
24 *Group v. Food & Drug Admin.*, No. 15-cv-976, 2016 WL 5171987, at *6 (D. Conn. Sept. 20,
25 2016); *Clemente v. FBI*, 71 F. Supp. 3d 262, 269 (D.D.C. 2014); *Martins v. U.S. Citizenship &*
26

27 ⁴ We note *CREW*’s dicta about when an agency must produce responsive records is not supported
28 by the statutory text or legislative history. Nothing in the FOIA says that Congress intended
agencies to produce non-exempt records “within days or a few weeks” after making a
determination on a FOIA request.

1 *Immigration Servs.*, 962 F. Supp. 2d 1106, 1127 (N.D. Cal. 2013); *Judicial Watch, Inc. v. Dep't of*
2 *Justice*, 774 F. Supp. 2d 225, 230 (D.D.C. 2011); *South Yuba River Citizens League v. Nat'l*
3 *Marine Fisheries Serv.*, No. Civ. S-06-2845, 2008 WL 2523829, at *5 (E.D. Cal. 2008); *NAACP*
4 *Legal Defense & Ed. Fund, Inc. v. U.S. Dep't of Housing & Urban Dev.*, No. 07 Civ. 3378, 2007
5 WL 4233008, at *6 (S.D.N.Y. Nov. 30, 2007).

6 Defendants point to two cases to argue that *EPIC 2006* has been “undermined” by more
7 recent decisions. Opp. at 13. But those cases are not at odds with *EPIC 2006*. In *Elec. Privacy Info.*
8 *Ctr. v. Dep't of Justice (“EPIC 2014”)*, the court found that under *CREW*, an agency goes through
9 a two-step process to respond to a FOIA request. 15 F. Supp. 3d 32, 41 (D.D.C. 2014). First, the
10 agency gathers and reviews documents to make a determination within 20 days of receipt. Second,
11 the agency “processes” the documents and releases them “promptly.” *Id.* at 41-42. If an agency
12 cannot comply with these time limits, it may present a court with “credible evidence that disclosure
13 within such time period is truly impracticable,” and the court may exercise its discretion to modify
14 the deadlines. *Id.* at 42. While *EPIC 2014* reached a different result than *EPIC 2006* on the facts,
15 the basic approach matches *EPIC 2006*.

16 The second case Defendants cite relied on *CREW* to hold that the FOIA’s 20-day deadline
17 “serves primarily as a means to obtain immediate judicial supervision over an agency’s response to
18 an outstanding FOIA response.” *Daily Caller v. Dep't of State*, 152 F. Supp. 3d 1, 10 (D.D.C.
19 2015). The court went on to find that “an agency’s failure to make and communicate its initial
20 determination before the statutory twenty-day deadline allows the requester to be deemed to have
21 exhausted his administrative remedies and to seek immediate judicial review[.]” *Id.* While that is
22 correct under *CREW*, it is not the end of the story. Once a FOIA requester files suit, a court may
23 “exercise its discretionary authority to issue a judgment declaring that the agency has, in fact,
24 violated the statutory timeline.” *Our Children’s Earth Found.*, 85 F. Supp. 3d at 1090 (issuing
25 declaratory judgment that agency failed to comply with statutory time limits). And as amended in
26 2016, the FOIA requires that a court must issue an order before ongoing noncompliance with the
27 law will be excused. 5 U.S.C. § 552(a)(4)(A)(viii)(II)(cc).

1 Defendants also claim that the *EPIC 2006* line of cases are easily distinguishable on the
2 facts. First, Defendants note that their components have begun to release documents in the past few
3 weeks, whereas the agencies in the *EPIC 2006* line of cases did not. While this is true, it is not a
4 dispositive fact. The question is whether the Court should extend the agencies more time because
5 exceptional circumstances exist and the agencies are exercising due diligence. For the reasons
6 discussed in II.A.1.b, Defendants have not demonstrated that they meet this standard.

7 Next, according to Defendants, the agencies in the *EPIC 2006* line of cases “failed to
8 present *any* evidence” that it would be impracticable to finish processing the disputed FOIA
9 requests within 20 business days. Opp. at 14 (emphasis in original). This maybe the case for *EPIC*
10 *2006*. But it is not true for *Elec. Frontier Found. v. Office of the Dir. of Nat. Intelligence*, 542 F.
11 Supp. 2d 1181, 1187 (N.D. Cal. 2008) (“*EFF 2008*”) or *Elec. Frontier Found. v. Office of Dir. of*
12 *Nat. Intelligence*, No. C 07-5278 SI, 2007 WL 4208311 at *4 (N.D. Cal. Nov. 27, 2007) (“*EFF*
13 *2007*”). In those cases, the agencies presented evidence in declarations just as they have here.⁵
14 Judge White and Judge Illston of this Court simply found that evidence unpersuasive.

15 Finally, Defendants point to the broad nature of Ms. Currier’s requests. Ms. Currier has
16 cooperated with the agencies to help narrow the scope, Supp. Hofmann Decl. at ¶ 3 Ex. A, and
17 remains open to working with the Defendants to facilitate the timely processing of the records she
18 seeks.

19 **2. Ms. Currier Will Suffer Irreparable Injury in the Absence of the** 20 **Requested Injunctive Relief**

21 Defendants argue first that because other FOIA litigants seeking records about the travel
22 ban have not sought preliminary injunctive relief means that she cannot have been irreparably

23 _____
24 ⁵ *EFF 2008*, No. 3:07-cv-1023 JSW, Dkt. Nos. 44-1 (Declaration of John Hackett, Director of
25 Information Management for the Office of the Director of National Intelligence), 44-2 (Declaration
26 of Gayla D. Sessoms, FOIA Coordinator for the National Security Division of the Department of
27 Justice); 44-3 (Declaration of John Colborn, Special Counsel in OLC), 44-4 (Declaration of
28 Thomas E. Hitter, Attorney-Advisor in OIP), 44-5 (Declaration of David M. Hardy, Section Chief
of the Record/Information Dissemination Section, Records Management Division, FBI), & 44-6
(Declaration of James M. Kovakas, Attorney-in-Charge of the FOI and Privacy Acts Office, Civil
Division, DOJ); *EFF 2007*, No. 3:07-cv-5278-SI, Dkt. No. 22-1 (Declaration of John Hackett,
Director of Information Management for the Office of the Director of National Intelligence).

1 harmed. Opp. at 16. But the question before *this* Court is whether this particular requester will
2 suffer irreparable harm in the absence of the requested relief. The record establishes that Ms.
3 Currier is a professional journalist whose FOIA requests for records about the travel ban have been
4 granted expedited processing. Several months later, they have not been processed in compliance
5 with the FOIA. The Supreme Court has granted certiorari to review the legality of the travel ban.
6 The parties and *amici* involved in the case have imminent deadlines to brief the matter, and oral
7 argument is scheduled before the Court on October 10. *Supreme Court Argument Calendar*
8 *October 2017* (July 17, 2017).⁶ Without injunctive relief, Ms. Currier will imminently lose the
9 opportunity to write about this topic while it is still timely and she can contribute to the public
10 debate about the legality of the travel ban.

11 Defendants next argue that Ms. Currier has not lost her statutory right to expedition because
12 the agencies have granted expedited processing. Opp. at 16. But statutes must be interpreted to
13 avoid absurd results when alternative interpretations are consistent with legislative intent. *Griffin v.*
14 *Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). It defies logic to conclude, as the Defendants
15 would have it, that a request entitled to expedited processing somehow imposes less of a legal
16 burden on an agency than a standard FOIA request. As the court found in *EPIC 2006*:

17
18 Congress could not have intended to create the absurd situation wherein standard
19 FOIA requests must be processed within twenty days (unless the agency can show
20 that exceptional circumstances exist for a delay), yet expedited requests empower
21 an agency to unilaterally decide to exceed the standard twenty-day period.

22 416 F. Supp. 2d at 38. The court held:

23 an agency that violates the twenty-day deadline applicable to standard FOIA
24 requests presumptively also fails to process an expedited request “as soon as
25 practicable.” That is, a *prima facie* showing of agency delay exists when an
26 agency fails to process an expedited FOIA request within the time limit applicable
27 to standard FOIA requests.

28 The presumption of agency delay raised by failing to respond to an expedited
request within twenty days is certainly rebuttable if the agency presents credible
evidence that disclosure within such time period is truly not practicable.

Id. at 39 (footnote omitted).

⁶ https://www.supremecourt.gov/oral_arguments/calendars/MonthlyArgumentCalOctober2017.html.

1 Defendants also contend that Ms. Currier’s irreparable injury cannot be based on potentially
2 withheld information. But there is no reason to believe all other records responsive to Ms. Currier’s
3 requests will be exempt from disclosure. Since filing this motion for preliminary injunction, she
4 has received more than 600 pages from Defendants and has an article based on records released
5 through this case. Supp. Hofmann Decl. ¶ 3 Ex. B (“Emails and other government
6 documents, released to The Intercept under the Freedom of Information Act, show how ill-
7 prepared the agency was, crafting guidance on the fly and frantically adjusting its response as
8 thousands of protesters descended on airports around the country.”). Other reporters in pending
9 FOIA lawsuits seeking overlapping records have also written articles based on material released to
10 them thus far. Supp. Hofmann Decl. ¶ 4 Ex. C. And even if all other requested records were
11 somehow withheld from the public in the days before the Supreme Court hears the travel ban case,
12 this fact itself would be newsworthy.

13 Defendants also argue that “recent, well-reasoned decisions have rejected similar claims
14 that FOIA plaintiffs suffer irreparable harm whenever an agency does not finish processing
15 expedited requests immediately.” Opp. at 17. But those decisions were all based on the specific
16 facts before each court, which are nothing like this case. In *Allied Progress v. CFPB*, the court
17 found that the requester had not shown substantial public interest in the requested records, so delay
18 in receiving them would not cause significant enough injury to constitute irreparable harm. No. 17-
19 cv-686, 2017 WL 1750263, at *6 (D.D.C. May 4, 2017). Notably, the court pointed out that the
20 “time-sensitive nature” of a FOIA request may constitute as irreparable harm—just not on the facts
21 before the court in that case. *Id.* at *6, citing *Judicial Watch, Inc. v. Dep’t of Homeland Security*,
22 514 F. Supp. 2d 7, 10 (D.D.C. 2007). In *Daily Caller*, the court found no irreparable harm where a
23 court order would have compelled the State Department to finish processing the plaintiff’s request
24 “only marginally sooner” than the agency otherwise expected to do so. 152 F. Supp. 3d at 13. And
25 in *EPIC 2014*, the court found that the requester failed to show irreparable harm when it “offer[ed]
26 nothing more than a bald assertion that [the agency] is obviously not processing its FOIA Request
27 in a timely fashion.” 15 F. Supp. at 45.
28

1 Here, by contrast, a substantial harm to an interest recognized by the courts is certain and
 2 irreversible. Irreparable harm exists where “ongoing public and congressional debates about issues
 3 of vital national importance cannot be restarted or wound back.” *Protect Democracy Project*, 2017
 4 WL 2992076, at *4 (quoting *EFF 2007*, 2007 WL 4208311 at *7). Ms. Currier seeks information
 5 about a matter of intense ongoing public interest in which the Supreme Court will imminently
 6 consider whether an Executive action was unconstitutionally based on religious animus. If the
 7 requested records are not processed immediately, she and the public will lose the ability to
 8 participate meaningfully in the national debate surrounding the constitutionality and propriety of
 9 that Executive action. *See, e.g., EFF 2008*, 542 F. Supp. 2d at 1187 (irreparable harm exists
 10 requested records could enable the public to participate meaningfully in a debate over legislation
 11 pending before Congress); *EFF 2007*, 2007 WL 4208311 at *7 (same); *EPIC 2006*, 416 F. Supp.
 12 2d 41 (same); *Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260
 13 (D.D.C. 2005) (same); *ACLU v. Dep’t of Justice*, 321 F. Supp. 2d 24, 30 (D.D.C. 2004) (same).

14 3. The Balance of Equities Favors Ms. Currier

15 Defendants claim that Ms. Currier’s interests in timely disclosure are “conclusory and
 16 speculative.” Opp. at 22. To the contrary, they are concrete and statutorily mandated. As a
 17 professional journalist, Ms. Currier has a statutory right to the timely processing of the records she
 18 seeks so that she can report on a time-sensitive matter of considerable interest to the general public.

19 Defendants also argue that the injunction Ms. Currier seeks would burden them and risk the
 20 possibility that exempt information might be erroneously released. Opp. at 19-22. But it will not
 21 burden them any more than Congress intended. As *EPIC 2006* noted:

22 Congress has already weighed the value of prompt disclosure against the risk of
 23 mistake by an agency and determined that twenty days is a reasonable time
 24 period, absent exceptional circumstances, for an agency to properly
 25 process *standard* FOIA requests . . . Vague suggestions that inadvertent release of
 26 exempted documents *might* occur are insufficient to outweigh the very tangible
 27 benefits that FOIA seeks to further—government openness and accountability.

28 416 F. Supp. at 42 (emphasis in original).

Defendants also argue that the issuance of an order compelling them to process Ms.
 Currier’s FOIA requests would impose a hardship on other requesters. Opp. at 19-20. But other

1 FOIA requesters would actually be benefitted by the relief Ms. Carrier seeks. As Defendants have
2 pointed out, many other requesters are seeking overlapping records related to the travel ban, both
3 ahead and behind Ms. Carrier in the processing queues. *See, e.g.*, Defs. Ex. A; Ex. F ¶ 25-29
4 (OLC); Ex. G ¶ 17 (DOS); Ex. I ¶ 12 (DHS-PRIV); Ex. J ¶ 4 (CBP). An order compelling the
5 agencies to process the responsive records by a certain date would ensure those requesters obtain
6 their records faster, too. *Natural Resources Defense Council v. Dep't of Energy*, 191 F. Supp. 2d
7 41, 43-44 (D.D.C. 2002) (by processing FOIA request in an expeditious manner, agency would
8 fulfill its responsibilities to other requesters seeking the same records).

9 **4. The Public Interest Favors the Requested Relief**

10 Defendants suggest that the information sought by Ms. Carrier can have no impact on the
11 travel ban litigation before the Supreme Court and other courts because she is neither a party nor
12 potential *amicus* in those cases. Opp. at 22. But Ms. Carrier is a journalist who writes for a major
13 national media outlet. Her analysis and publication of the requested records will contribute to the
14 public debate, as well as help inform *amici* and others in the midst of briefing the actual litigation.
15 *See @NealKatyal*, Twitter (Aug. 2, 2017, 6:49 PM), [https://twitter.com/neal_katyal/status/8929254](https://twitter.com/neal_katyal/status/892925452670582784)
16 [52670582784](https://twitter.com/neal_katyal/status/892925452670582784) (“Must read article w FOIA’d docs. Admin has always tried to hide the truth about
17 its Muslim ban but it’s coming out.”) Further, “an agency’s compliance with a mandatory statutory
18 regime is presumably always in the public interest.” *Protect Democracy Project*, 2017 WL
19 2992076 at *5.

20 **B. The Court Should Order Defendants to Prepare a Vaughn Index to Help** 21 **Resolve the Remaining Issues in This Case**

22 Defendants claim that the injunctive relief sought by Ms. Carrier is inappropriate because it
23 is “effectively the ultimately relief” she seeks in this case. Opp. at 3. That is not correct. As Ms.
24 Carrier explained in her motion:

25 Judicial resolution of the expedited processing issue would not resolve all issues
26 raised in the first amended complaint. Once the question of processing time is
27 resolved, the Court would retain jurisdiction to review the completeness and
28 propriety of the Defendants’ substantive determination of Ms. Carrier’s FOIA
requests. *See Open America v. Watergate Special Prosecution Force*, 547 F. 2d
605 (D.C. Cir. 1976).

1 Mot. Prelim. Inj. at 14 n.9.

2 In preparation to litigate the issues remaining in this case, Ms. Currier asks the Court to
3 order Defendants to prepare an index pursuant to *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).
4 As the Ninth Circuit has explained, agencies that withhold documents under the FOIA “have been
5 required to supply the opposing party and the court with a ‘*Vaughn* index,’ identifying each
6 document withheld, the statutory exemption claimed, and a particularized explanation of how
7 disclosure of the particular document would damage the interest protected by the claimed
8 exemption.” *Weiner v. FBI*, 943 F.2d 972, 977 (9th Cir. 1991). Courts regularly order defendant
9 agencies to produce *Vaughn* showings—either in index or declaration form—after documents have
10 been processed to facilitate the resolution of the issues remaining in the case. *See, e.g., ACLU v.*
11 *Dep’t of Defense*, 339 F. Supp. 2d 501, 503-05 (S.D.N.Y. 2004); *Judicial Watch, Inc. v. Dep’t of*
12 *Energy*, 191 F. Supp. 2d 138, 141 (D.D.C. 2002); *NRDC*, 191 F. Supp. 2d at 43-44; *EPIC 2006*,
13 416 F. Supp. 2d at 43.

14 IV. CONCLUSION

15 Defendants are long past the FOIA’s statutory deadlines. Delays in disclosing non-exempt
16 documents “violate the intent and purpose of the FOIA, and the courts have a duty to prevent these
17 abuses.” *Long v. IRS*, 693 F.2d 907 (9th Cir. 1982); *Payne*, 837 F.2d at 494 (same). Ms. Currier’s
18 motion for a preliminary injunction should be granted and this Court should order Defendants to
19 process the requested records immediately.

20 DATED: August 17, 2017

Respectfully submitted,

21 _____
22 /s/ Marcia Hofmann

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5

6 **UNITED STATES DISTRICT COURT**
7 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
8 **SAN FRANCISCO DIVISION**

9
10 CORA CURRIER,

11 Plaintiff,

12 v.

13 DEPARTMENT OF HOMELAND SECURITY,
14 et al.,

15 Defendants.
16
17
18
19

Case No. 3:17-cv-01799-JSC

**SUPPLEMENTAL DECLARATION OF
MARCIA HOFMANN IN SUPPORT OF
PLAINTIFF CORA CURRIER'S
MOTION FOR PRELIMINARY
INJUNCTION**

Date: August 24, 2017
Time: 9:00 a.m.
Place: Courtroom F, 15th Floor
Magistrate Judge Jacqueline Scott Corley

20 1. I am an attorney of record for the plaintiff Cora Currier in this matter and a member
21 in good standing of the California State Bar, and am admitted to practice before this Court. I have
22 personal knowledge of the matters stated in this declaration. If called upon to do so, I am
23 competent to testify to all matters set forth here.
24

25 2. Ms. Currier is a staff reporter for the Intercept, where she writes about national
26 security, counterterrorism and immigration.
27

1 3. On July 13, 2017, I sent an email to counsel for Defendants narrowing the scope of
2 Ms. Currier’s FOIA requests. A true and correct copy of this email is attached as Exhibit A.

3 4. On August 8, 2017, The Intercept published a news article written by Ms. Currier
4 based on FOIA documents released through this case. A true and correct copy of the following
5 news article is attached as Exhibit B: *Documents Reveal the Behind-the-Scenes Chaos of the*
6 *Muslim Ban*, THE INTERCEPT (August 8, 2017), [https://theintercept.com/2017/08/08/documents-](https://theintercept.com/2017/08/08/documents-reveal-the-behind-the-scenes-chaos-of-the-muslim-ban)
7 [reveal-the-behind-the-scenes-chaos-of-the-muslim-ban](https://theintercept.com/2017/08/08/documents-reveal-the-behind-the-scenes-chaos-of-the-muslim-ban).

9 5. On August 2, 2017, The Daily Beast published a news article based on FOIA
10 documents released through other FOIA litigation that overlaps with the material in this case. A
11 true and correct copy of the following news article is attached as Exhibit C: *Betsy Woodruff,*
12 *Trump’s DHS Ordered Agents to Block Congressmen During Travel Ban*, DAILY BEAST (Aug. 2,
13 2017), [http://www.thedailybeast.com/border-patrol-ordered-to-block-congressmen-during-travel-](http://www.thedailybeast.com/border-patrol-ordered-to-block-congressmen-during-travel-ban)
14 [ban](http://www.thedailybeast.com/border-patrol-ordered-to-block-congressmen-during-travel-ban).

17 I declare under penalty of perjury of the laws of the United States of America that the
18 foregoing is true and correct to the best of my knowledge and belief. Executed August 17, 2017.

20 /s/ Marcia Hofmann
21 Marcia Hofmann

Exhibit A

Exhibit A

Cora Currier v. DHS, et al.

Case No. 3:17-cv-01799-JSC

SUPPLEMENTAL DECLARATION OF MARCIA HOFMANN IN SUPPORT OF
PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION

Subject: Currier responses to agency proposals / meet and confer
From: Marcia Hofmann <marcia@zeitgeist.law>
Date: 7/13/17, 11:32 AM
To: "Berns, Matthew J. (CIV)" <Matthew.J.Berns@usdoj.gov>

Hi Matt,

I've spoken with Cora Currier and have responses to the agencies' proposals for narrowing the scope of her FOIA requests for records related to the travel ban executive orders. Please take a look at the items below and don't hesitate to let me know if you have any questions.

Could we please schedule a time to meet and confer early next week? I'd like to discuss whether we can agree to a firm date for the completion of processing of Ms. Currier's requests to avoid the need for litigation over that issue. What would be a convenient date and time for you?

Best,

Marcia

--

Marcia Hofmann
Founder and Principal
Zeitgeist Law PC
25 Taylor Street
San Francisco, CA 94102
(415) 830-6664

Ms. Currier is willing to exclude these categories of records from the scope of the requests:

- 1) News briefings and clips. This exclusion was suggested by OIP, but Ms. Currier agrees to this proposal with respect to all agencies and DOJ components.
- 2) All filed court pleadings and emails forwarding them without additional commentary. This exclusion was suggested by OIP, but Ms. Currier agrees to this proposal with respect to all agencies and DOJ components.
- 3) CBP records related to particular travelers except A) complaints submitted by or pertaining to particular travelers, and B) requests for guidance about how to apply the ban to particular travelers and responses to those requests.
- 4) All records and emails accounts from the Department of State Office of the Legal Adviser.
- 5) Duplicate records identified by any agency.

Ms. Carrier is ***not*** willing to exclude these categories of records from the scope of the requests:

- 1) All emails entirely between or among OLC staff.
- 2) Classified records identified by DOD.
- 3) All correspondence between the DOJ Office of Public Affairs and reporters.

The Department of State asked Ms. Carrier to consider identifying particular offices or individuals whose records she'd like the agency to search. Ms. Carrier asks that the agency conduct a search in the following offices:

- * Office of the Secretary
- * Executive Secretariat
- * Operations Center
- * Policy Planning Staff
- * Counselor of the Department
- * Under Secretary for Civilian Security, Democracy, and Human Rights
- * Bureau of Conflict and Stabilization Operations
- * Bureau of Democracy, Human Rights, and Labor
- * Bureau of Population, Refugees, and Migration
- * Bureau of Consular Affairs
- * United States embassies and consulates in Iran, Iraq, Syria, Sudan, Yemen, Somalia, and Libya