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December 8, 2017

By ECF Filing

The Honorable Magistrate Judge John H. Rich III  
U.S. District Court, District of Maine  
Edward T. Gignoux U.S. Courthouse  
156 Federal Street  
Portland, ME 04101

Dear Magistrate Judge Rich III,

Pursuant to your Minute Order of November 24, 2017, Defendants respectfully submit the following letter brief concerning the instant case, *ACLU of Maine, et al. v. U.S. Customs and Border Protection, et al.* (17-cv-132). On the conference call with the parties on November 21, 2017, your honor identified the key points of disagreement in this FOIA suit: (1) whether document production should be specific to this case or permitted to proceed in a manner that takes into consideration the Defendants' need to coordinate its response in this case with responses in the other related cases pending nationally, and (2) the appropriate pace at which the court should order Defendants to process and serve responsive documents.

First, Defendants respectfully submit that they should be entitled to process the 17 related ACLU affiliate requests in a coordinated manner with the instant case, and Plaintiffs can offer no argument as to why their particular field office request should be elevated and given a specific, accelerated production schedule. Second, the law requires that Defendants process the requested documents as soon as practicable – a threshold that is clearly met in this case. Accordingly, Defendants propose that they continue to be permitted to process the instant FOIA request as swiftly as practicable, while providing quarterly status updates to the Court to ensure that Defendants are meeting their legal obligations.

The FOIA requires federal agencies to make requested records “promptly available” to any person upon receiving a request which “(i) reasonably describes such records and (ii) is made in accordance with published rules . . . .” 5 U.S.C. § 552(a)(3)(A); *see also id.* § 552(a)(6)(C)(i). If an agency grants a request expedited processing, the FOIA provides that it must process the request “as soon as practicable.” *Id.* § 552(a)(6)(E)(iii). A request which has received expedited processing is placed on a separate track, and is processed prior to earlier-filed non-expedited requests in the

processing queue, but after other earlier-filed expedited requests. *See* 6 C.F.R. § 5.5(b). Of note, the FOIA permits agencies to aggregate for purposes of processing, “certain requests by the same requestor, or by a group of requestors acting in concert . . . .” 5 U.S.C. § 552(a)(6)(B)(iv). And CBP has specifically promulgated regulations authorizing just this type of aggregation. 6 C.F.R. § 5.5(d).

As a default rule, agencies must “determine” within 20 business days of receiving a proper FOIA request “whether to comply with such request.” 5 U.S.C. § 552(a)(6)(A)(i). However, the 20-business day deadline does not require that an agency complete its processing of a FOIA request within that timeframe. *See, e.g., CREW v. FEC*, 711 F.3d 180, 185 (D.C. Cir. 2013).<sup>1</sup> The FOIA “does not assign any particular time frame to release . . . the records sought.” *Landmark Legal Found. v. EPA*, 910 F. Supp. 2d 270, 275 (D.D.C. 2012). If the agency fails to comply with the 20-business day requirement, the only effect is that the requester “shall be deemed to have exhausted his administrative remedies,” enabling the requester to file suit. 5 U.S.C. § 552(a)(6)(C)(i); *see also Daily Caller v. DOS*, 152 F. Supp. 3d 1, 10 (D.D.C. 2015).

Where an agency needs more time to process a request, in light of the nature of the request or resource considerations, “the court (if suit has been filed) will supervise the agency’s ongoing progress, ensuring that the agency continues to exercise due diligence in processing the request.” *CREW*, 711 F.3d at 189; *see also Protect Democracy Project, Inc. v. DOD*, No. 17-cv-00842 (CRC), 2017 WL 2992076, at \*5 (D.D.C. July 13, 2017). Moreover, in order to satisfy competing demands of multiple requesters, agencies typically process requests within a particular processing queue on a first-in, first-out basis. *See, e.g., Daily Caller*, 152 F. Supp. 3d at 8 (“In general, federal agencies process incoming FOIA requests on a first-in/first-out basis.”); *Schweihl v. FBI*, 933 F. Supp. 719, 723-24 (N.D. Ill. 1996) (finding that plaintiff failed to identify “exceptional circumstances” necessary to “overrule defendants’ first in/first out method of handling FOIA requests”).

Plaintiffs submitted their FOIA request to CBP on February 2, 2017. *See* ECF No. 1-1. Generally speaking, the request asks CBP to search its Boston Field Office and the offices for numerous airports within the Boston Field Office’s jurisdiction for various categories of records regarding the implementation and enforcement of Executive Order 13,769. Several of these categories are strikingly broad. For example, Plaintiffs seek all records “concerning CBP’s interpretation, enforcement, and implementation” of the Executive Order; all records concerning “[a]ny other judicial order or executive directive issued regarding” the Executive Order; and all records concerning “[a]ny guidance provided to DHS field personnel shortly after” the issuance of the Executive Order. *See* ECF No. 1-1 at 5-6.

On the same day, various other ACLU affiliates submitted 16 parallel requests seeking the

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<sup>1</sup> As other courts have recognized, FOIA decisions by the U.S. Court of Appeals for the District of Columbia Circuit and the U.S. District Court for the District of Columbia are entitled to particular deference because of the special expertise and experience of those courts in applying the statute. *See, e.g., Our Children’s Earth Found. v. EPA*, No. 08-cv-1461, 2008 WL 3181583, at \*6 (N.D. Cal. Aug. 4, 2008) (decisions “entitled to appropriate deference”); *Matlack, Inc. v. EPA*, 868 F. Supp. 627, 630 (D. Del. 1994) (describing the D.C. Circuit as “on the leading edge of interpreting” the FOIA statute); *cf. Estate of Abduljaami v. DOS*, No. 14-cv-7902, 2016 WL 94140, at \*5 n.2 (S.D.N.Y. Jan. 7, 2016) (“considerable experience” with FOIA).

same or substantially similar categories of records from other specified field offices, airports, and ports of entry, and on February 10, 2017, the ACLU of Michigan submitted a supplemental request seeking similar information from certain land borders. In addition, the national ACLU organizations and their District of Columbia affiliate also submitted a FOIA request on February 2, 2017 seeking the same or similar categories of records, this time from CBP's headquarters. Fifteen of these requests are now in litigation in thirteen cases filed in thirteen district courts throughout the country.

Because the various ACLU affiliates all seek substantially the same categories of records—indeed, in many instances, overlapping records—and were submitted in what the ACLU has described as a “coordinated FOIA filing,”<sup>2</sup> CBP aggregated the requests pursuant to 5 U.S.C. § 552(a)(6)(B)(iv) and 6 C.F.R. § 5.5(d). As a result of this aggregation, CBP coordinated a single search for records responsive to all of the requests, which included a search of the email records for custodians in the various field offices identified in the ACLU affiliates' requests. In addition, based on its aggregation of the requests, CBP granted all the requests expedited processing—placing them in the expedited processing queue ahead of all non-expedited requests and later-filed expedited requests—and granted the ACLU affiliates' requests for fee waivers.

While CBP's collection and processing efforts were ongoing, it sought to consolidate the thirteen parallel cases filed by the ACLU affiliates into a single multi-district litigation. *See* ECF 19. The Judicial Panel on Multidistrict Litigation denied CBP's motion on the grounds that the related actions were “unlikely to entail extensive pretrial proceedings” and “[i]ndeed . . . probably will not involve *any* discovery.” ECF 21 at 1. Contrary to Plaintiffs' suggestion, the Panel did not reject the agency's decision to coordinate a single search for records potentially responsive to the ACLU affiliates' requests, nor would such a decision fall within the Panel's jurisdiction. Indeed, Plaintiffs “do not presume to dictate how the Government chooses to process these records,” and instead are asking the Court to set an accelerated schedule for the release of non-exempt records responsive to their particular request. *See* ECF No. 30 at 8.

This Court first inquired whether it should issue a document processing requirement specific to this case, or whether Defendants should be permitted to coordinate their document processing in the related cases. The Court should reject Plaintiffs' demand for a processing schedule tied to Boston-specific records for several reasons.

A specific production schedule here would likely delay the agency's completion of the processing of all the ACLU affiliates' field office requests. As explained above, the ACLU affiliates' requests seek identical categories of records from field offices, and, accordingly, there is substantial overlap in the types of potentially responsive records the agency must review. *See* Howard Decl. ¶ 34, attached as Exhibit A. The agency can most efficiently and expeditiously process these records if it is not required to parse them by case or custodian to satisfy processing thresholds for records specific to a particular field office. Deferring to the agency's assessment as to how best it can process the records allows the agency to achieve a faster processing rate, in particular through the application of search tools and the streamlined review of records raising similar issues related to responsiveness and

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<sup>2</sup> *See* ACLU, Press Release, *ACLU Files Demands for Documents on Implementation of Trump's Muslim Ban* (Feb. 2, 2017), <https://www.aclu.org/news/aclu-filesdemands-documents-implementation-trumps-muslim-ban>.

exemptions. *Id.* at ¶ 37. Not only does this expedite the ultimate release of responsive records to all ACLU affiliates, it better ensures consistent and accurate treatment of exempt information, much of which could implicate sensitive law enforcement information and/or privacy rights of individual travelers. *Id.*; *see also Daily Caller*, 152 F. Supp. 3d at 15 (compelling production on truncated timeline “raises a significant risk of inadvertent disclosure of records properly subject to exemption under FOIA”). By contrast, requiring the agency to process records so as to meet field office-specific processing thresholds may slow the release of records, as the agency will need to shift resources to identify and focus on specific field office records, rather than conducting the review in the most efficient manner possible.<sup>3</sup> Howard Decl. ¶ 38.

Moreover, absent truly extraordinary circumstances, courts have routinely denied efforts by FOIA requesters to substantially accelerate document production pursuant to an arbitrary timetable. *See The Nation Magazine v. Dep't of State*, 805 F. Supp. 68, 74 (D.D.C. 1992) (stating that “only rarely” will a court order an “agency to abandon its first-in first-out processing” schedule).

Plaintiffs put forward no such circumstances showing that they are entitled to a faster production schedule. Plaintiffs state only that the current processing rate is “unacceptable, particularly given the expedited processing requested in Plaintiffs’ FOIA request.” ECF No. 30 at 9. Yet, as noted above, Defendants have already granted expedited processing to Plaintiffs’ request. And once a request is in the expedited queue, the FOIA requires only that the agency process the request “as soon as practicable.” 5 U.S.C. § 552(a)(6)(E)(iii). “The statute does not assign any particular time frame to release . . . the records sought.” *Landmark Legal Found. v. EPA*, 910 F. Supp. 2d 270, 275 (D.D.C. 2012). As the attached Declaration makes clear, the agency is indeed processing the related ACLU requests as quickly as practicable, and consequently, Plaintiffs’ claim that they are somehow entitled to greater expedition is without merit. *See* Howard Decl. ¶ 36.

Further, it is not clear what harm Plaintiffs will suffer if they are not granted accelerated processing. In the Joint Status Report, Plaintiffs state only that that “[t]he subject matter of this request is a matter of intense concern to Plaintiffs and to the public.” ECF No. 30 at 11-12. It is doubtful whether Plaintiffs could allege harm in not immediately receiving documents for which they are “concerned.” And in any event, in cases like this one, where the plaintiff has not provided evidence of a looming event necessitating the immediate release of information, and merely hopes to contribute to a public discussion, courts have found similar conclusory claims of harm to be lacking. *See, e.g., Electronic Privacy Information Center v. Dept. of Justice (EPIC)*, 15 F. Supp. 3d 32, 44-47 (rejecting similar claim based on desire for “public [to] participate fully in the ongoing debate,” as “fundamentally flawed because it ignores the well-established statutory FOIA process”). Absent any harm that could be visited upon Plaintiffs in allowing the agency to produce at its current pace, there is no basis to impose an arbitrary timeline for production in this case.

In addition, Courts have held that both agencies and the public have a strong interest in

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<sup>3</sup> In at least one District Court, that of the Northern District of Georgia, the court declined to accept an ACLU affiliate’s conclusory assertion for the production of requested documents by a date certain, and instead ordered further briefing as to a production schedule. A copy of that order is attached hereto. *See* Court Order, attached as Exhibit B.

maintaining an “orderly, fair, and efficient administration of FOIA,” which would be jeopardized by accelerating one request to the detriment of others. *The Nation Magazine*, 805 F. Supp. at 74. Given the finite nature of the agency’s FOIA capabilities, Plaintiffs’ demand effectively asks the Court to order the agency to vault Plaintiffs’ request over earlier-filed expedited requests and to dedicate an inequitably large fraction of its FOIA processing resources to their request. Courts have explained that “for every FOIA request that is expedited, another one must be moved back in the queue,” and such accelerated processing “means that either some requests are merely put ahead of others, or that expedited processing is rendered meaningless, as expediting all requests is tantamount to expediting none.” *Progress v. Consumer Fin. Prot. Bureau*, No. CV 17-686 (CKK), 2017 WL 1750263, at \*7 (D.D.C. May 4, 2017); *see also EPIC*, 15 F. Supp. 3d at 47 (“[A]llowing EPIC to jump to the head of the line would upset the agency’s processes and be detrimental to the other expedited requesters, some of whom may have even more pressing needs.”); *Protect Democracy Project*, 2017 WL 2992076, at \*6 (“[R]equiring production by a date certain, without any factual basis for doing so, might actually *disrupt* FOIA’s expedited processing regime rather than implement it.”). It is difficult to conceive of any basis upon which to accelerate Plaintiff’s Boston Field Office request ahead of ACLU’s Los Angeles, Miami, Houston or Baltimore Field Office requests, to name a few, submitted the same day. Thus, to ensure equitable treatment of other FOIA requestors, including the other ACLU affiliates in related requests, Defendants respectfully submit that a production requirement specific to this case should not be ordered.

As to the Court’s second question, the appropriate processing rate that should be ordered, this query is answered directly by the FOIA: the agency must process the request “as soon as practicable.” 5 U.S.C. § 552(a)(6)(E)(iii). What is practicable—and hence what is required by the statute—will vary depending on the size, scope, detail, and complexity of the records sought by the request; other agencies or components which must be consulted or to which documents might have to be referred for additional review; exemption issues; and the resources available to process the request. Here, based on those considerations, the agency currently estimates that it should be able to process, on average, approximately 6,500 pages per month across all of the ACLU field office requests, and will release the responsive, non-exempt records on a rolling basis.<sup>4</sup> As set forth in the accompanying declaration of Patrick Howard, a processing rate greater than 6,500 pages per month is impracticable under the current circumstances.

First, CBP’s FOIA review process for requests like Plaintiffs’ is complex and takes time to conduct properly in accordance with CBP’s legal obligations. Howard Decl. ¶¶ 13, 24. The records potentially responsive to Plaintiffs’ and the other ACLU affiliates’ requests include substantial amounts of information exempt from disclosure under one or more of the FOIA’s nine statutory exemptions, including privileged information, 5 U.S.C. § 552(b)(5); information “the disclosure of which would constitute a clearly unwarranted invasion of personal privacy,” *id.* § 552(b)(6); and information compiled for law enforcement purposes, *id.* § 552(b)(7). Howard Decl. at ¶ 25. The records also contain information in which other agencies and components of DHS have equities,

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<sup>4</sup> By “process,” the agency generally means that it should review those pages for responsiveness, apply any applicable redactions to responsive records, and then release those non-exempt, responsive records which have been fully reviewed and redacted. The complete review process is described in detail in the accompanying declaration. Howard Decl. ¶¶ 27-32.

requiring inter- and intra-agency consultation to ensure appropriate exemptions are asserted. *Id.*

As a result, despite Plaintiffs' claims, this FOIA review process is substantially different than document review for civil discovery, and review rates for FOIA processing are not comparable to those achievable in civil discovery. Significantly, "the stakes of disclosure are different in the two regimes, justifying and arguably necessitating separate reviews with distinct considerations in mind during each." *See Stonehill v. IRS*, 558 F.3d 534, 539-40 (D.C. Cir. 2009). Because the agency must make records available to the public as a whole and because "there is no opportunity to obtain a protective order . . . the stakes of disclosure for the agency are greater in the FOIA context." *Id.* Thus, review and processing of a record in consideration of the FOIA's nine statutory exemptions is substantially more involved, and therefore, substantially more time-consuming, than simply reviewing a document for relevance and a few applicable privileges.

Second, while CBP is dedicating significant resources to the review of Plaintiffs' and the other ACLU affiliates' requests, the agency's FOIA resources are stretched thin overall. CBP, which is a component of DHS and not a cabinet-level department, has only 25 full-time FOIA staff and four supervisory employees. Howard Decl. ¶ 7. Despite these limited resources, CBP has been inundated by an escalating number of FOIA requests this fiscal year. As compared to Fiscal Year 2016, the number of FOIA requests CBP received in Fiscal Year 2017 increased by approximately 33% percent (and approximately 70% as compared to Fiscal Year 2015). *Id.* at ¶ 15. In particular, CBP has received over 100 FOIA requests in Fiscal Year 2017 related to Executive Order 13,769 and/or Executive Order 13,780, also entitled "Protecting the Nation from Foreign Terrorist Entry Into the United States." *Id.* at ¶ 17. Over 90 of these requests are still open and being processed, and at least 21 of these are the subject of litigation in district courts across the country. *Id.* And these requests are in addition to the thousands of simple FOIA requests the agency has received from individuals this year. *Id.* at ¶ 15. Any processing rate the agency can achieve in this case (and the other ACLU affiliate cases) must be balanced against the agency's obligations to process the myriad other requests it has received. In sum, the agency believes that it has shown that it is currently processing Plaintiffs' request "as soon as practicable" and urges the Court not to order a production timetable in excess of the agency's legal obligations or resource constraints.

For the foregoing reasons, Defendants request that this Court enter an order permitting CBP to continue processing Plaintiffs' request as swiftly as practicable, and directing the parties to submit quarterly joint status reports on the agency's progress.

Sincerely,

*/s/ Michael Drezner*  
Michael Drezner



3. The statements I make in this declaration are based upon my personal knowledge, which includes knowledge acquired through information furnished to me in the course of my official duties and agency files that I personally reviewed in the course of my official duties.

4. This declaration provides an overview of the FOIA Division's process for responding to FOIA requests, describes the FOIA Division's current workload and resource constraints, situates Plaintiffs' FOIA request (and other parallel requests submitted by other ACLU affiliates) in that context, and describes the agency's plan for completing its response to Plaintiffs' request.

CBP's Process for Responding to FOIA Requests, Resource Constraints, and Workload

5. CBP is a law enforcement agency comprised of more than 60,000 employees charged with enforcing hundreds of Federal statutes. Approximately 45,000 of those employees are armed law enforcement officers engaged in carrying out CBP's expansive border security mission (U.S. Border Patrol Agents, CBP officers, and CBP Air and Marine Agents).

6. Broadly, the FOIA Division at CBP reviews FOIA requests, determines whether responsive records exist, and, if so, whether they can be released in accordance with the FOIA. In processing such requests, the FOIA Division consults with CBP personnel and, when appropriate, with other components in the Department of Homeland Security (DHS), as well as other Executive Branch agencies.

7. Despite the large size of CBP as an organization, the FOIA Division currently consists of only 25 full-time staff and four supervisory employees. Specifically, there are 25 Government Information Specialists (GISs) who report to three Branch Chiefs and one Director who, in turn, report to the Privacy and Diversity Office. None of these employees is an attorney.

8. A GIS, sometimes referred to as a FOIA processor, is tasked with reviewing information and providing advice and assistance to managers and employees concerning FOIA issues, policies, and procedures. He or she is also responsible for processing FOIA requests for CBP records, a process that involves reviewing the content of records to make a determination regarding the proper disclosure under FOIA. A GIS is responsible for reviewing and preparing draft responses to requests for releases of information and in so doing must apply any relevant statute, regulation, agency rule and/or executive order as they pertain to FOIA requests. Additionally, a GIS must ensure compliance with DHS regulations, Department of Justice policies, and other applicable laws.

9. A Branch Chief in the FOIA Division is responsible for managing policy formulation, advising agency management, and ensuring compliance with federal laws governing the flow of information. Branch Chiefs oversee the release of CBP documents and information, assist with FOIA litigation matters, and oversee the processing of FOIA responses and adherence to federal laws and regulations.

10. The FOIA Division identifies incoming FOIA requests as either simple or complex. A simple request – also referred to as a traveler request – is one where a member of the traveling public requests records related to his or her travel. Examples of traveler requests include records of a person's entry into and exit from the United States, I-94 records, and records of inspections and interactions with CBP employees. The FOIA Division generally has access to CBP's travel database systems and is able to query the systems in order to quickly respond to simple FOIA requests.

11. Complex FOIA requests – also referred to as non-traveler requests – are all other types of requests received. Examples of complex requests include requests from businesses for

import and export records, requests for Office of Professional Responsibility (OPR) investigation files, and requests from media sources or special interest groups focused on a variety of matters not specific to an individual traveler. The FOIA Division rarely has direct access to records that are responsive to complex requests. Rather, the FOIA Division must first determine which CBP offices are likely to have responsive information and then work with those offices to gather any responsive records. Assessments of where responsive records are likely to be maintained are based on a review of the content of the request itself and the nature of the records sought, as well as the FOIA Division's familiarity with the types and location of records that each office maintains and discussions with knowledgeable agency personnel. Potentially responsive records may be located in one or multiple systems of records, email systems, computer hard drives, and/or hard copy (paper) files.

12. Based upon my experience, in a typical fiscal year, approximately 85% of the total volume of FOIA requests will be simple requests and 15% of the total volume will be complex requests.

13. Plaintiffs' FOIA request is a complex request, as are the other related FOIA requests submitted by the various ACLU affiliates.

14. The FOIA Division's caseload, which was already onerous, has dramatically increased over Fiscal Year 2017. In Fiscal Year 2015 (October 1, 2014 – September 30, 2015), the FOIA Division received 52,290 FOIA requests. The FOIA Division received 66,742 FOIA requests in Fiscal Year 2016 (October 1, 2015 – September 30, 2016), which constituted a 28 percent increase over requests received in Fiscal Year 2015.

15. The 2017 Annual FOIA Report will not be published for a number of months. However, based upon the raw data that has been supplied to me as of November 15, 2017, it

appears that the initially reported total FOIA requests received for Fiscal Year 2017 is 88,840. This number may change slightly before the Annual Report is published. Based upon this initial information, the number of FOIA requests received in Fiscal Year 2017 exceeds the number of requests received in Fiscal Year 2016 by 33 percent and exceeds the requests made in Fiscal Year 2015 by 70 percent.

16. This surge in the amount of FOIA requests submitted to the agency has put the FOIA Division under considerable stress as its limited FOIA processing staff and resources struggle to keep up with this increased workload.

Plaintiffs' FOIA Request and Others Seeking  
Records Relating to Executive Orders 13,769 and 13,780

17. The FOIA Division and other CBP offices have received over 100 FOIA requests since January 2017 related to Executive Order 13,769, dated January 27, 2017, and/or Executive Order 13,780, dated March 6, 2017, both entitled "Protecting the Nation from Foreign Terrorist Entry Into the United States." To my knowledge, more than 90 of those requests are still open and being processed, and there are 21 cases involving some of these requests in litigation in district courts across the country.

18. ACLU affiliates submitted 19 of the FOIA requests (18 directed to different CBP field offices and 1 directed to CBP headquarters) regarding Executive Order 13,769. Currently, there are 13 separate federal cases in active litigation based on 15 of these requests.

19. As of November 15, 2017, CBP is subject to five Court orders in the ACLU EO FOIA litigations. In the Southern District of California, case number 3:17-cv-00733, CBP has been ordered to process 1,000 pages of the records identified as potentially responsive by December 6, 2017, 1,000 more pages each month thereafter, and all documents (approximately

4,300 pages) by April 6, 2018. In the Western District of Washington, case number 2:17-cv-00562, CBP was ordered to process 1,000 pages by November 17, 2017, 1,000 more pages by December 18, 2017, and all remaining documents (approximately 4,100 pages) from the specified Seattle document custodians by January 16, 2018. In the Eastern District of Michigan, case number 5:17-cv-11149, CBP has been ordered to process all of the documents from the specified Detroit field office document custodians within 5 months, at a rate of 820 pages per month. CBP was required to process and release the first 820 pages by November 27, 2017. In the District of Oregon, case number 3:17-cv-00575, CBP has been ordered to process all documents identified as potentially responsive (more than 5,200 pages) and produce all responsive documents not in controversy on or before May 31, 2018. Finally, on November 21, 2017, in the Northern District of Illinois, case number 1:17-cv-02768, CBP has been ordered to process 950 pages per month, beginning December 31, 2017.

20. In addition to the dozens of requests related to Executive Order 13,769 and 13,780, as of November 15, 2017, the FOIA Division has received 94 requests related to President Trump's plan to build a Border Wall. Thirty-five of those requests are in progress, 19 of those requests have documents that have been released or are awaiting redactions, and 40 requests are closed. Of the requests in progress, five are currently in litigation. In one of those five cases, CBP has agreed to produce 500 responsive, non-exempt pages per month.

21. The large number of these complex Executive Order- and Border Wall-related requests and the extensive litigation demands associated with them have put unusually high burdens on the agency's FOIA processing capabilities.

22. I note that in my experience, the only complex FOIA request that compares with the scope of the current ACLU EO FOIA requests is CBP-2015-023425. That FOIA request,

seeking records regarding “alleged abuse of minors while in CBP custody,” has been in active litigation in Tucson, Arizona since February 2015 – almost three years. Over 27 months, CBP has released approximately 14,500 responsive pages of records and there are still more documents to process.

CBP’s Processing Capabilities for the ACLU Affiliates’ FOIA Requests

23. As I noted above, normally the vast majority (85%) of FOIA requests that CBP receives are simple requests that seek one or more of certain categories of travel records related to an individual. Those records generally require minimal redactions due to their display format, and they typically involve routine redactions.

24. The email records sought by the ACLU affiliates, as well as other FOIA requests pertaining to Executive Order 13,769, are substantively different from the types of records CBP routinely processes, and more extensive efforts to review and redact these records are required.

25. For example, the records that CBP has identified thus far as potentially responsive to Plaintiffs’ request include a large amount of privileged information, including attorney-client communications, attorney work product, and information protected by the deliberative process privilege, as well as other sensitive information, including information compiled for law enforcement purposes and information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. The records also contain information supplied by outside agencies such as the Department of State and other components of DHS, including United States Citizenship and Immigration Services (USCIS). Such information requires inter- and intra-agency consultation that further increases the time needed to process these FOIA requests.

26. This contrasts with the simple requests that typically constitute the vast majority of requests received by CBP, for which review and processing is more straightforward, involve fewer types of redactions, and do not generally require inter- and intra-agency consultation.

27. The complexity of the records at issue in this and the related actions also require a correspondingly more extensive and complex review process. CBP is employing a multi-office review process to ensure that all information that must be protected from release is properly withheld, and that all information that can be released is provided to requestors. Put succinctly, each page that CBP produces in this litigation, as well as for the other ACLU affiliate requests will be reviewed multiple times.

28. First, documents are uploaded into the processing system and divided into “batches” for review. A batch is then released or tasked to a first-level reviewer to review for responsiveness to the request and for application of initial, proposed redactions consistent with FOIA exemptions. Thereafter, a second-level reviewer reviews the batch for accuracy.

29. Because Plaintiffs’ FOIA requests are in litigation, attorneys in the CBP Office of Chief Counsel are also involved. After the initial and secondary review by the FOIA Division, Office of Chief Counsel attorneys may conduct, or answer questions pertaining to, reviews for responsiveness and redactions for applicable FOIA exemptions. They may also assist with the identification of what, if any, outside agency equities exist in potentially responsive records.

30. No attorneys in the CBP Office of Chief Counsel are solely responsible for FOIA matters; rather, they all shoulder other responsibilities outside of the FOIA context. Therefore, these attorneys are unable to devote all of their time to this level of review.

31. In addition, agencies and individuals outside of CBP are also involved in the review. For example, if outside agency equities are identified, CBP consults with the relevant

agency or agencies to ensure appropriate FOIA exemptions are applied. Additionally, because this and other requests are in litigation, the CBP Office of Chief Counsel must coordinate its review with the DHS Office of General Counsel and litigation counsel from the Department of Justice.

32. Only after all of these multiple levels of review are completed are the non-exempt responsive records provided to the FOIA Division to release, as appropriate, to Plaintiffs.

33. As the foregoing makes clear, there are significant differences between the records at issue in this case (and the nature of processing and review involved) and those that are typically sought in 85% of the FOIA requests submitted to CBP. Given the sheer number of FOIA requests seeking these and similar records regarding Executive Order 13,769, CBP's FOIA processing resources are already under tremendous strain. The entry of demanding production orders has a direct and serious impact on CBP's overall FOIA program, resulting in an increased backlog that raises the risk of additional litigation and, more importantly, prevents CBP from getting information to the people requesting it.

34. In an effort to provide Plaintiffs the records they seek in the most efficient and practicable timeframe possible, CBP is coordinating its processing of the ACLU affiliate FOIA requests concerning Executive Order 13,769 so that CBP avoids duplication of its processing efforts (collecting records, reviewing them for responsiveness and exemptions, etc.) in responding to the separate requests, which would only serve to delay the release of records. While the requests seek records from different field offices, there is significant overlap in the searches that will need to be completed in order to identify potentially responsive records, as well as in the documents that will ultimately need to be processed.

35. CBP currently estimates that it should be able to process, on average, approximately 6,500 pages per month across all of the records collected as potentially responsive to the ACLU affiliates' requests. While CBP will work as diligently as possible to meet this target, the precise volume processed each month could vary as a result of certain factors. For instance, the processing rate could decrease as a consequence of reviewing more complex, responsive documents, or due to processing obligations in other FOIA requests, competing Court orders, staffing leaves of absence, or government shutdown. Conversely, the processing rate may increase as a consequence of heightened efficiencies, additional staff, or an unusual concentration of simple or nonresponsive documents.

36. In sum, based on the nature of Plaintiffs' request and the limitations on CBP's resources, as discussed above, I do not believe CBP could currently achieve a faster average processing rate.

37. CBP's estimated processing rate is, moreover, based on the agency's ability to coordinate processing of the records for all ACLU affiliate requests. Coordination of the agency's processing of these records will, I believe, result in economies of scale, thus leading to more expeditious completion of the agency's responses to the FOIA requests. Equally important, coordination will help the agency to ensure that it provides consistent responses and redactions of potentially sensitive information that is exempt from disclosure under the FOIA across all of these related FOIA requests.

38. If CBP were unable to coordinate its processing of these records due to divergent search and conflicting response obligations, CBP estimates that its total processing rate across all of the ACLU affiliate requests would decrease substantially. Based on the significant overlap in terms of the records sought and the content they contain, treating each request as separate and

distinct would result in duplication of large portions of the agency's search and review process, as well as inefficient and unnecessary use of the agency's already limited resources, to the detriment of *all* parties with active FOIA requests with the agency.

39. For example, among the records responsive to Plaintiffs' request are communications between CBP personnel in Washington, D.C., and the group of Directors of Field Operations at CBP's Field Offices across the country. With respect to this category of record, if the agency processed each of the ACLU affiliate requests separately, it would likely be forced to review the same email over a dozen times as it processed each of the ACLU affiliate field office requests because each Director of Field Operations would have a copy of the same email in his or her account. By coordinating its processing of these requests, CBP is working to substantially reduce such duplicative review. Other categories of records present similar opportunities to avoid duplicative efforts.

40. In addition, many records from the various field offices raise similar issues regarding responsiveness and redactions. Based on my experience overseeing FOIA processing at CBP, I believe that coordinated review of such records will allow CBP to process such records more expediently and more consistently with the FOIA's statutory exemptions.

#### Efforts to Accelerate the Processing of This and Related Requests

41. CBP has recently made a number of changes in and to its FOIA program to respond to the influx of FOIA requests relating to Executive Orders 13,769 and 13,780, and the planned Border Wall. The agency expects that these changes will provide additional capacity to expeditiously and efficiently respond to these requests.

42. First, the FOIA Division has dedicated certain personnel to work solely on FOIA requests seeking records relating to Executive Orders 13,769 and 13,780.

43. Second, the FOIA Division has recruited personnel from outside of its office to work on these requests. The FOIA Division solicited personnel to work for the FOIA Division on a full-time basis through what is known as the “temporary duty assignment” or “temporary detail” program (TDY). A CBP employee may volunteer for or be directed to fill a TDY position with his or her supervisor’s approval. A TDY position is for a finite period of time.

44. These TDY personnel normally lack any background in FOIA processing or review and thus require training regarding the statute and the obligations and exemptions it prescribes, as well as the software associated with the review. Moreover, because of their inexperience, the records processed and redacted by the TDY personnel are subjected to additional scrutiny by their supervisors.

45. Third, CBP has been diligently exploring ways to make the review process more effective and implemented improvements in its software. CBP’s existing processing systems and related software were not equipped to handle the magnitude or complexity of the results of the searches pursuant to ACLU affiliates’ FOIA requests. Accordingly, CBP migrated all records identified to date as potentially responsive to the ACLU affiliate requests to new software, which I believe will enable us to more efficiently process records, avoid duplication of efforts, and ensure consistent responses and applications of exemptions across the FOIA requests.

46. While this shift in technology will be labor-saving over time, the implementation of, and training of our employees on, the new software initially slowed the review and processing of the documents. It is my expectation, however, that our use of and familiarity with the new technology will grow over time, allowing the process to benefit from greater efficiency.

47. Finally, the FOIA division has been proactively posting documents that have been released in conjunction with EO litigation in its on-line reading room under its Executive

Orders on Travel Section as a way to boost public accessibility to these documents. *See* [foiarr.cbp.gov](http://foiarr.cbp.gov).

The Effect of a Court Ordered Processing Schedule on Other Requests Before CBP

48. CBP has a two-track system for processing expedited and non-expedited FOIA requests.

49. Ordinarily, CBP processes requests on a first-in, first-out basis within each track.

50. When CBP grants a request for expedition of a request, the effect is to move that request into the expedited queue, ahead of all non-expedited requests but behind earlier-filed expedited requests.

51. CBP granted Plaintiffs' request for expedition of their request, which moved their request ahead of thousands of FOIA requests pending with the agency in the non-expedited queue.

52. CBP is now processing Plaintiffs' request and the other ACLU affiliate requests as quickly as is practicable in light of this prioritization and the resource constraints described above.

53. A processing schedule that requires CBP to further prioritize Plaintiffs' records would necessarily require the agency to divert resources away from other requests, including earlier-filed requests.

54. Many of the requests that would be displaced by Plaintiffs' demand for additional priority concern Executive Order 13,769 and seek records from CBP Headquarters or records with national implications, as opposed to Plaintiffs' request for local records.

55. Individual case processing schedules like those entered in some of the other ACLU EO FOIA cases lower CBP's overall processing rate. Preparing document releases is time

consuming, and each release requires roughly the same amount of time regardless of the volume of documents involved. Thus, the more scheduled releases, the less time and resources CBP has to devote to the review of documents and ensuring that the review is being conducted in the most efficient manner possible.

I declare under penalty of perjury that the forgoing is true and correct to the best of my knowledge.

Executed on this 5<sup>th</sup> day of December, Washington, D.C.

*/s/ Patrick A Howard*

Patrick A. Howard

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

AMERICAN CIVIL LIBERTIES	:	
UNION OF GEORGIA, INC.;	:	
AMERICAN CIVIL LIBERTIES	:	
UNION OF NORTH CAROLINA,	:	
INC.; AMERICAN CIVIL	:	CIVIL ACTION NO.
LIBERTIES UNION OF SOUTH	:	1:17-CV-01309-RWS
CAROLINA, INC.; and	:	
AMERICAN CIVIL LIBERTIES	:	
UNION OF WEST VIRGINIA,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
U.S. DEPARTMENT OF	:	
HOMELAND SECURITY and	:	
U.S. CUSTOMS AND BORDER	:	
PROTECTION,	:	
	:	
Defendants.	:	

**ORDER**

On November 3, 2017, the parties submitted their Joint Status Report [Doc. No. 35] to the Court. After reviewing the Report, the Court enters the following Order.

Defendants are presently processing Plaintiffs’ FOIA requests focusing on numerical data sought by Plaintiffs and guidance provided to DHS field

personnel shortly after President Trump signed Executive Order 1. Defendants selected the custodians from whom emails would be collected and the date range for their search. Defendants also selected a list of core search terms to utilize in searching the emails. In order to facilitate the email searches, Defendants transitioned the email files to a new review platform. Defendants have begun their review process and are producing documents on a rolling basis.

Plaintiffs object to Defendants' unilateral selection of search terms, custodians, and proposed date range. Plaintiffs also request that the Court impose a deadline for completion of the production.

The Court will permit Defendants to proceed with the review and production as they propose. Nonetheless, as the production progresses, the parties should communicate in good faith to address concerns raised by Plaintiffs. Also, the Court will be willing to revisit Plaintiffs' objections should the production be inadequate.

The Court finds that it is appropriate to set a timetable for production. Defendants shall submit a proposed schedule within 14 days, and Plaintiffs may file a response within 14 days thereafter.

**SO ORDERED**, this 7th day of November, 2017.



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**RICHARD W. STORY**  
United States District Judge