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December 22, 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 the Court's Order of November 24, 2017, and the Court's Order of December 14, 2017, Defendants respectfully submit the following letter brief in response to Plaintiffs' submission of December 8, 2017. ECF No. 36.

Since the parties' submissions on December 8, significant developments occurred concerning the related ACLU-affiliate cases. In *ACLU of Southern California, et al. v. DHS, et al.* (C.D. Cal. 17-cv-2778), the local ACLU affiliate moved for the processing of approximately 7,800 pages in a matter of weeks, or by December 22, 2017. In response, on December 13, 2017, the District Court for the Central District of California ordered that by January 2, 2018 Defendants process "the first 2,700 pages of documents identified as potentially responsive to Plaintiffs' FOIA request . . ." See Defs' Ex. A at 4, ECF No. 37-2. The Court further ordered that Defendants process 1,000 pages by the end of January, and complete production of all remaining documents by the end of February. *Id.* at 5. The Court arrived at these requirements by explicitly calculating what it believed to be Defendants' total processing capacity, and subtracting the total processing requirements ordered in other related ACLU-affiliate cases. *Id.* at 3-4. The Court then allocated all of the remaining processing capacity of the agency solely to the Central District of California ACLU affiliate case. *Id.* at 4-5 (recognizing that its production order would likely use up the remainder of the agency's "total monthly capability" for processing through February 28).

On that same day, following a request for further briefing, the District Court for the Northern District of Georgia ordered in *ACLU of Georgia, et. al. v. DHS, et al.* (N.D. Ga 17-cv-1309) that by January 16, 2018, "Defendants shall process no less than 1,000 pages of the records identified as potentially responsive to Plaintiffs' FOIA request . . ." See Defs' Ex. B at 6, ECF No. 37-3. The order imposes additional monthly processing requirements, and states that by June 17, 2018,

“Defendants shall have fully responded to Plaintiff’s request.” *Id.*¹ Thus, on top of the order from the Central District of California, which purported to consume the entirety of CBP’s processing capacity, the District Court for the Northern District of Georgia imposed on Defendants additional burdensome processing requirements.

Upon review of the two December 13 court orders, and in consideration of the five additional orders previously issued in the ACLU affiliate cases, CBP has determined that it “can no longer attempt to coordinate processing of the ACLU affiliate FOIA requests, *i.e.*, process documents across all the ACLU cases at one time.” Supp. Dec. of Patrick Howard ¶ 15, attached as Exhibit A. As Defendants explained in their initial letter-brief, CBP had reasonably determined that such an effort would have been the most efficient and equitable method to address all 18 of the ACLU affiliate requests. *Id.*; *accord* ECF No. 35 at 3-4. However, as a result of the ACLU affiliates’ haphazard approach, filing 13 federal district court cases based on nearly identical FOIA requests, onerous, case-specific processing requirements have been imposed in more than half of these related cases, reducing the agency’s ability to efficiently and equitably process the requests in all such cases. Supp. Dec. ¶ 15.

As to the appropriate processing rate in this case, this Court should take into account the two December 13 court orders, as well as the five other district court orders in related cases. *Id.* ¶¶ 11-12. Collectively, these orders have put enormous strain on CBP, causing it to devote much of its processing capacity solely to a handful of ACLU cases in which affiliates have sought and obtained specific processing orders. *Id.* ¶14. Indeed, the agency has had to divert resources from other mission objectives in order to process the FOIA requests concerning Executive Orders 13,769 and 13,780, including ACLU EO affiliate requests. *Id.* ¶ 7. Further, given the recent issuance of multiple orders which require the rapid processing of large quantities of documents, the agency will be especially burdened in the next few months. *Id.* ¶¶ 14, 17. In light of the above facts, the agency respectfully proposes that it process 200 pages of records identified as potentially responsive to the instant request by February 28, 2018, and then process pages at a greater rate in anticipation of a further production on April 30, 2018, and every two months thereafter, until production is completed. *Id.* ¶ 16.

The agency anticipates a later increase in processing because, by March 2018, the agency expects to have completed processing the records covered by the orders in the Western District of Washington and Central District of California. Assuming no additional orders imposing burdensome processing obligations with deadlines before early March 2018 are entered, CBP should then be able to devote more of its resources to processing records in the instant case. Given the significant strain posed by the orders currently in place in the other ACLU affiliates’ cases, and processing obligations in other related cases, it would be difficult if not impossible for CBP to satisfy an order in excess of that proposed above. *Id.* ¶ 17.²

¹ Undersigned counsel concedes that the previous order from the Northern District of Georgia left this issue unresolved. To the extent that undersigned counsel stated anything differently on the conference call with the Court, undersigned counsel regrets any misunderstanding and a copy of the Order is attached as Exhibit B of Defendants’ initial letter brief. ECF No. 35-2.

² Undersigned counsel conferred with Plaintiffs’, through counsel, to inform them of Defendants’ position. Plaintiffs indicated that they would not agree to Defendants’ proposal set forth above.

By contrast, Plaintiffs claim that Defendants “should be able to complete processing in a matter of weeks,” or, in the alternative, Plaintiffs request that Defendants process “820 pages per month, with a hard deadline of November 2, 2018.” ECF No. 36 at 5. Plaintiffs again claim that the thousands of pages at issue here can be reviewed quickly because “reviewing 9,000 documents in a week is standard fare for a Maine attorney.” *Id.* at 6. While Defendants do not quibble with the reviewing abilities of a Maine attorney, the review process for government documents in FOIA litigation is significantly different than in private, civil discovery. *See Stonehill v. IRS*, 558 F.3d 534, 539-40 (D.C. Cir. 2009) (holding that, at least in certain respects, “the stakes of disclosure [to the public at large] are greater in the FOIA context.”). As Patrick Howard explained in his prior declaration, review of the documents for the related ACLU requests requires a process whereby multiple reviewers examine the documents for issues such as responsiveness, redactions, and the existence of outside agency equities. Howard Decl. ¶¶ 28-29, ECF 35-1. A comparison between the instant FOIA production and civil discovery is strained at best. Accordingly, Plaintiffs have no support for their request that all responsive documents should be produced “within a matter of weeks.”³

In the alternative, Plaintiffs argue that the Court should order Defendants to process 820 pages per month, “with a deadline of November 2, 2018, to complete all processing.” ECF No. 36 at 6. Plaintiffs urge that this deadline “is necessary to comply with FOIA’s requirement for prompt and open disclosure.” *Id.* at 7. Of course, the FOIA “does not assign any particular time frame to release of the records sought.” *Landmark Legal Found. v. EPA*, 910 F. Supp. 2d 270, 275 (D.D.C. 2012). Rather, the statute mandates simply that expedited requests be processed “as soon as practicable.” 5 U.S.C. § 552(a)(6)(E)(iii). Plaintiffs provide no legal or factual basis which would support an arbitrary production deadline of November 2, 2018. The Court should therefore defer to CBP’s understanding of its resources and limitations, and adopt CBP’s proposal set forth above.

Finally, Plaintiffs now request that any document production by CBP include two additional pieces of information: “(1) the number of hours spent in processing, and (2) a Vaughn index listing the reason for any claimed exemption for withheld documents.” ECF No. 36 at 6. Plaintiffs provide no justification for either requirement, and on that ground alone the Court should reject this request. As to the hourly reporting requirement, it appears that this request was inspired by the order issued by the District Court of the Northern District of Illinois in *ACLU of Illinois, et al. v. DHS, et al.* (N.D. Ill. 17-cv-2768), where the court ordered that Defendants provide reports detailing, among other things: “(1) the number of full-time employees at both the Level 1 and Level 2 review levels who have worked on the FOIA request as to the Executive Order itself over the preceding month; (2) the number of hours that the OCC attorneys worked on the project during the preceding month” *See* Pl’s Ex. 4, ECF No. 36-4.

³ Plaintiffs claim that Defendants have produced only “approximately 10 pages” of records “related to the Boston field office.” ECF No. 36 at 5. In fact, as stated in Defendants’ interim production letters, Defendants have produced approximately 271 pages of records responsive to Plaintiffs’ request. Plaintiffs apparently discount many of these pages because they are responsive to all field office requests, rather than simply Boston alone. Plaintiffs provide no argument as to why such documents are non-responsive to their instant request.

To the extent Plaintiffs are requesting the same information, they are welcome to review CBP's submissions in *ACLU of Illinois* to avoid duplicative agency effort. To the extent Plaintiffs seek information as to the number of hours worked on only the Boston Field Office request, such a demand would be difficult if not impossible to satisfy. Many documents are responsive to more than one ACLU affiliate request, and such a reporting obligation would likely require CBP reviewers to keep detailed logs to track their time spent only on this request. There is no legal basis for such a request, and indeed imposing such a timekeeping requirement would likely delay the processing and production of responsive documents to these Plaintiffs and all Plaintiffs across the ACLU affiliate cases.

Additionally, Plaintiffs' request for a Vaughn index in this case would be both premature and burdensome at this stage. "To provide for the broadest possible disclosure and further the adversary process, courts often require the withholding agency to provide a 'Vaughn' index. Generally, a Vaughn index provides a broad description of the requested material or information, and the agency's reason for withholding each document or portion of a document." *Carpenter v. U.S. Dep't of Justice*, 470 F.3d 434, 442 (1st Cir. 2006) (internal citations omitted). However, the First Circuit has held that a Vaughn index is not necessarily required in all FOIA litigation. For instance, if a requester does not challenge the adequacy of claimed exemptions, a Vaughn index is "unwarranted . . ." *Maynard v. C.I.A.*, 986 F.2d 547, 558 (1st Cir. 1993). Plaintiffs here have not yet challenged any exemptions cited in response to their request. Therefore, the need for a Vaughn index is unclear.

Indeed, even if Plaintiffs eventually challenge CBP's claimed exemptions, any request for a Vaughn index at this time is premature. "Generally, agencies should be given the opportunity to file dispositive motions and produce affidavits regarding claimed exemptions before they are ordered to produce *Vaughn* indices." *Ioane v. Comm'r of Internal Revenue*, No. 3:09-CV-00243-R CJ- (RAM), 2010 WL 2600689, at * (D. Nev. Mar. 11, 2010). In addition, Defendants expect to meet and confer with Plaintiffs prior to the filing of dispositive motions in an effort to narrow the issues of dispute regarding claimed exemptions. Plaintiffs' demand that the agency prepare a Vaughn index justifying each agency withholding, while simultaneously processing thousands of pages of documents, would impose a substantial and unnecessary burden on the agency, especially given the likelihood that the parties may agree that only a subset of the agency's withholdings are in dispute.

For the foregoing reasons, Defendants request that this Court enter an order stating that CBP should process 200 pages of records identified as potentially responsive to the instant request by February 28, 2018, and then process pages at a greater rate, to be determined by CBP, in anticipation of a further production on April 30, 2018, and every two months thereafter, until production is completed. *Id.* ¶ 16. Defendants propose that the parties submit joint status reports every 60 days, updating the Court as to the status of processing and production.

Sincerely,

/s/ Michael Drezner
Michael Drezner

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE**

AMERICAN CIVIL LIBERTIES UNION OF)
MAINE, et al.,)

Plaintiffs,)

v.)

U.S. CUSTOMS AND BORDER)
PROTECTION, et al.,)

Defendants.)

Civil No. 2:17-cv-132-GZS

SUPPLEMENTAL DECLARATION OF PATRICK HOWARD

I, Patrick A. Howard, declare the following to be true and correct:

1. I am a Branch Chief within the Freedom of Information Act Division (FOIA Division) at U.S. Customs and Border Protection (CBP), U.S. Department of Homeland Security (DHS). I have been a Branch Chief in the FOIA Division since February 8, 2015. In this capacity, I oversee a staff of Government Information Specialists (GIS), the processing of requests for records submitted to CBP pursuant to FOIA, 5 U.S.C. § 552, the Privacy Act (PA), 5 U.S.C. § 552a, and other activities conducted pursuant to applicable records access provisions.

2. I am familiar with CBP’s procedures for responding to FOIA requests. I provide technical and administrative supervision and direction to a group of FOIA specialists in processing FOIA requests and assist with FOIA/PA litigation matters, and I am personally familiar with the processing of FOIA/PA responses, including, at times, by directly reviewing for adequacy and compliance to federal laws and regulations. I am familiar with the February 2, 2017, and February 10, 2017, FOIA requests submitted by Plaintiffs and various affiliates of the American Civil Liberties Union (ACLU) to CBP.

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. The purpose of this declaration is to supplement my December 5, 2017 declaration (“Howard Decl.”), ECF No. 35-1, and further explain the FOIA Division’s processing capabilities in light of resource constraints, the time it takes to process records, and court orders entered in other ACLU Executive Order FOIA litigations.

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

5. As explained in my December 5, 2017 declaration, CBP recently made a number of changes to its FOIA program to improve its capacity to expeditiously and effectively respond to the ACLU Executive Order FOIA requests. This includes migrating all records identified as potentially responsive to a new processing platform and dedicating certain personnel to work solely on certain FOIA requests seeking records relating to Executive Order 13,769 and 13,780 (EO FOIAs) which include the related ACLU affiliate requests. Further, CBP has recruited and secured CBP personnel from outside the FOIA Division to assist in the processing of records, which has required removing them from their normal CBP mission responsibilities. Howard Decl. ¶ 41 – 46.

6. Specifically, with regard to personnel, despite the fact that the agency received approximately 88,840 FOIA requests in Fiscal Year 2017, and nationwide, has only twenty-five GIS-level employees, the FOIA Division has dedicated three GIS-level employees to work exclusively on the EO FOIAs on a full-time basis.

7. In addition, the FOIA division has obtained personnel to assist in processing records related to the EO FOIAs through what is known as a “temporary duty assignment” or

“temporary detail” program (TDY). As this assignment or detail is temporary, the exact number of personnel is subject to change, but as of the date of this declaration, the equivalent of over thirty full time personnel have been removed from their normal CBP mission responsibilities to work exclusively on the processing of records for litigation regarding the EO FOIAs.

8. While the improved processing platform and number of personnel assigned to the EO FOIAs has increased the number of pages the agency is able to review at one time, all such pages are subject to a multi-level review process. *See* Howard Decl. ¶¶ 27 – 32. This review process takes time, but is necessary to ensure the agency protects privileged and sensitive information and consults with the appropriate third parties. Howard Decl. ¶ 25.

9. Taking into account the complexity of the records requested, the new processing platform, the number of personnel currently assigned to work on the EO FOIAs, the time associated with training those personnel, as well as the multi-level review process, as explained in my December 5, 2017 declaration, CBP had estimated it would be able to process, on average, approximately 6,500 pages per month across all ACLU EO affiliate FOIA cases. Howard Decl. ¶ 35. This was an estimate only and, as explained in my December 5, 2017 declaration, the number could vary as a result of several factors. Howard Decl. ¶ 35.

Impact of ACLU EO FOIA Court Orders

10. As of December 18, 2017, CBP is subject to seven Court orders in the ACLU EO FOIA litigations, each requiring the agency to process a certain number of records at certain intervals.

11. In the Southern District of California, case number 3:17-cv-00733, CBP was 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 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 18, 2017, 1,000 more pages by December 18, 2017, and all remaining documents 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 five months at a rate of 820 pages per month, beginning 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 and produce all responsive documents not in controversy on or before May 31, 2018, with a “significant amount” of these documents processed by March 1, 2018. 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. In the Northern District of Georgia, case number 1:17-cv-01309, CBP was ordered on December 13, 2017 to process 1,000 pages of records by January 16, 2018, and at least 1,000 pages each month thereafter, with all responsive non-exempt documents produced by June 17, 2018. In the Central District of California, case number 2:17-cv-02778, CBP was ordered on December 13, 2017 to process the first 2,700 pages of potentially responsive documents for the Central District of California custodians by January 2, 2018, and the next 1,000 pages of documents by January 31, 2018, and to produce all responsive non-exempt documents by February 28, 2018.

12. Collectively, these court orders require CBP to process over 9,000 pages of records in January 2018 and over 8,000 pages of records in February 2018.

13. These orders exceed CBP’s previous estimate, reported in my December 5, 2017 declaration, of the number of pages it would be able to process per month across all of the ACLU affiliates’ requests.

14. While CBP will make every effort to comply with these court orders, by virtue of these orders, seven ACLU FOIA cases have effectively monopolized the FOIA Division's processing resources available to all of the EO FOIAs, including the ACLU EO affiliate requests (resources that CBP has very substantially increased in recent months, *see supra* ¶¶ 5, 7) through the end of February 2018. As such, the agency is concerned that it may not be able to comply with an additional court order that imposes a significant processing burden on CBP prior to March 2018.

15. Upon review of these orders, CBP has also determined that it can no longer attempt to coordinate processing of the ACLU affiliate FOIA requests, *i.e.*, process documents from custodians across all the ACLU cases at one time. CBP determined that such an effort would have been the most efficient and equitable method to address all 18 of the ACLU affiliate requests. However, the agency's ability to efficiently and equitably process records across all ACLU cases has been undermined by the burdensome court orders that have been imposed in more than half of the related ACLU cases.

16. Accordingly, CBP can commit to processing 200 pages of records identified as potentially responsive to the ACLU Maine request by February 28, 2018. The agency expects that this processing rate should significantly increase after that date, in anticipation of a production date of April 30, 2018, and every two months thereafter, until the agency processes all responsive, non-exempt records concerning the instant request.¹

¹ As of the date of this declaration, CBP also can commit to processing 200 pages of potentially responsive records for two other ACLU affiliates' request—those at issue in *ACLU of Maine v. DHS*, case no. 2:17-cv-00132 filed in the District of Maine, and *ACLU of Arizona v. DHS*, case no. 2:17-cv-01083 filed in the District of Arizona—by February 28, 2018, with the expectation that the processing rates for these two other requests will similarly significantly increase after that date.

17. Specifically, because CBP expects that by February 28, 2018, it will have satisfied, or substantially satisfied, the onerous production obligations imposed by the court orders currently in place from the Western District of Washington and the Central District of California, CBP anticipates that after this date it likely would be able to process pages potentially responsive to the ACLU Maine request, as well as for the other related pending ACLU affiliate requests, at a greater rate. However, given the burdensome production orders imposed on CBP through the end of February, and the number of other requests in this group of ACLU affiliate requests that CBP intends to process concurrently, I believe it would be difficult if not impossible for CBP to satisfy any court ordered processing obligation in excess of that proposed above.

18. Additionally, the agency anticipates that by April 30, 2018 it will have satisfied, or substantially satisfied, the onerous production obligations imposed by the court orders currently in place in the Southern District of California and the Eastern District of Michigan. Therefore, CBP anticipates that after this date it likely would be able to further increase the rate at which it is able to process pages potentially responsive to the ACLU Maine request, as well as the other related pending ACLU affiliate requests.

19. CBP notes, however, that for the reasons explained in my December 5, 2017 declaration, several factors, including but not limited to court orders, could result in the agency's processing rate increasing or decreasing over time or for a given time period. The agency believes that it can best keep the Court apprised of any changes in expected processing rates through the filing of periodic joint status reports.

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

Executed on this the 21st day of December, Washington, D.C.

/s/ Patrick A Howard

Patrick A. Howard