UNITED STATES DISTRICT COURT
FOR NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS, *et al.*,	)	
Plaintiffs,	)	
v.	)	No. 17 C 2768
U.S. DEPARTMENT OF HOMELAND SECURITY and U.S. CUSTOMS AND BORDER PROTECTION	)	Judge Dow
Defendants.	)	

DEFENDANTS' REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STAY PROCEEDINGS PENDING DECISION ON MOTION TO TRANSFER

In their Motion to stay the proceedings, Defendants requested that this Court impose a brief stay of the proceedings—likely only for a matter of weeks—while their motion to transfer this and twelve other related actions filed by ACLU affiliates is pending before the Judicial Panel on Multidistrict Litigation. As Defendants have explained, a temporary stay of proceedings until the JPML can decide Defendants' motion to transfer serves the interests of judicial economy and avoids any significant burden to either party. The JPML is likely to hear and decide the transfer motion only a few weeks after the first deadline in this case. Any stay of this duration would have no effect on the timing of Defendants' release of responsive records, and thus Plaintiffs will suffer no prejudice. Moreover, the strategic behavior of Plaintiffs and the other ACLU affiliates in bringing the related actions as thirteen separate, but admittedly "coordinated" lawsuits concerning parallel FOIA requests for identical or nearly identical categories of records, *see* Transfer Mot. at 4-7 (ECF No. 19-3), clearly imposes a burden on Defendants from having to engage in duplicative proceedings in thirteen courts. And Plaintiffs have not explained why this

Court should now expend its resources on pretrial proceedings—including status reports, scheduling conferences, and possible discovery—when those issues would duplicate those in the twelve other related actions and would need to be re-litigated before the transferee court.

Stays pending a JPML motion, while not automatic, are routine. *See, e.g.*, Defs.' Mem. at 3-4 (ECF No. 23-1) (collecting authorities); *see also, e.g.*, *San Diego Unified Port Dist. v. Monsanto Co.*, No. 15-cv-00578-WQH-JLB, 2016 WL 4496826, at *1 (S.D. Cal. Feb. 1, 2016) ("majority of courts have concluded that it is often appropriate to stay preliminary pretrial proceedings"); *Automated Transactions, LLC v. Bath Sav. Inst.*, No. 2:12-cv-393-JAW, 2013 WL 1346470, at *2 (D. Me. Mar. 14, 2013) (courts grant stays "frequently"); *Bonenfant v. R.J. Reynolds Tobacco Co.*, No. 07-60301-CIV, 2007 WL 2409980, at *1 (S.D. Fla. July 31, 2007) (granting stays is "common practice").[1] Contrary to Plaintiffs' suggestion, there is no exception to the typical practice when the government seeks transfer of FOIA cases. Indeed, as discussed below, stays pending a decision of the JPML have been granted in numerous FOIA cases. In light of the, burden that a piecemeal approach imposes on the government and the Court, the ACLU affiliates' strategic approach to the litigation, and the limited duration of any potential stay here, this Court should grant Defendants' request for a temporary stay.

[1] Plaintiffs erroneously suggest that "denials [of stays pending a JPML decision] are legion." Pls.' Opp'n at 9. The cases they cite for this proposition are easily distinguishable, and, in any event, are against the clear weight of authority recognizing that stays in this context are routine. *See Sehler v. Prospect Mortg., LLC*, No. 1:13cv473(JCC/TRJ), 2013 WL 5184216, at *3 (E.D. Va. Sept. 16, 2013) (denying stay where defendant agreed to decertification of class before moving for consolidation before the JPML and where stay would have delayed case by four to six months, during which time trial would occur); *Sullivan v. Cottrell, Inc.*, No. 11CV1076S, 2012 WL 694825, at *5 (W.D.N.Y. Feb. 29, 2012) (holding that stay was not warranted where motion to remand raised issues regarding court's jurisdiction and where court could decide remand motion and motion to dismiss before the JPML heard transfer motion); *St. Joe Co. v. Transocean Offshore Deepwater Drilling Inc.*, 774 F. Supp. 2d 596, 600-02 (D. Del. 2011) (denying stay where motion to remand was fully briefed by parties and was granted by court in same opinion as stay motion); *Barber v. BP, PLC*, No. 10-0263-WS-B, 2010 WL 2266760, at *2 (S.D. Ala. June 4, 2010) (denying stay motion in putative class action where district court had previously denied 23 "substantively identical motions to stay" proceedings).

I. PLAINTIFFS WILL NOT SUFFER HARDSHIP FROM A TEMPORARY STAY

Plaintiffs do not dispute that this case is in the early stages of litigation and that any stay would likely be of a brief duration—likely a matter of weeks, not months. Courts have readily found that plaintiffs suffer no prejudice in similar circumstances. *See* Defs.' Mem. at 6.

Instead, Plaintiffs argue that FOIA is different, and that "the requested stay *inherently* prejudices the rights that FOIA guarantees" by delaying the release of responsive, non-exempt records by Defendants. Pls.' Opp'n at 6-8 (ECF No. 29). Contrary to Plaintiffs' contention, there is no reason that stays pending JPML decisions should be treated differently in the context of a FOIA case. Defendants are aware of two instances in which the government sought centralization of FOIA actions by the JPML. *See* Transfer Mot. at 9-10. In both, transferor courts granted motions to stay the proceedings pending the JPML's decision, and Defendants are not aware of any transferor court in these actions that denied a stay motion. *See, e.g.*, *Freedom Magazine v. IRS*, No. 91-cv-6813 (S.D. Fla.) (ECF No. 10); *Freedom Magazine v. IRS*, No. 91-cv-2921 (D. Md.) (ECF No. 6); *Freedom Magazine v. IRS*, No. 91-cv-12598 (D. Mass.) (ECF entry Feb. 7, 1992); *Freedom Magazine v. IRS*, No. 91-cv-704 (S.D. Ohio) (ECF No. 6); *Bach v. IRS*, No. 91-cv-20184 (N.D. Cal.) (ECF No. 13); *Chandler v. IRS*, No. 91-cv-20183 (N.D. Cal.) (ECF No. 15); *Kimmich v. IRS*, No. 91-cv-20182 (N.D. Cal.) (ECF No. 13); *Licciardi v. IRS*, No. 91-cv-148 (D.N.H.) (ECF No. 5).[2] Plainly, then, stays pending JPML do not "inherently prejudice[]" the right to information under FOIA.

Moreover, notwithstanding their conclusory assertions of "delay," Pls.' Opp'n at 8,

[2] On June 6, 2017, the Western District of Washington denied Defendants' motion to stay in one of the related actions. *See* Order of June 6, 2017, *ACLU of Washington v. DHS*, No. 17-0562 (RSL) (ECF No. 20). This Court is not bound by that decision and should decline to follow it, as it ignores many of the key considerations justifying a stay here. Contrary to that court's decision, no delay in the production of documents will result from granting a stay because Defendants' processing of the ACLU affiliates' FOIA requests is ongoing and will continue with or without a stay. *See infra* Pt. I.

Plaintiffs fail to explain how a temporary stay would have any effect on the timing of the release of responsive records in this case. Currently, Defendants' response to the complaint is due June 29, 2017. (ECF No. 20.) Briefing on Defendants' motion to transfer has already been completed, and Defendants anticipate that their motion to transfer will be heard by the JPML on July 27, 2017 and decided shortly thereafter. As Defendants explained in their Motion, even if a stay is imposed, Defendants will continue to compile and review records during the pendency of the stay. Defs.' Mem. at 7. Indeed, as Plaintiffs acknowledge, *see* Pls.' Opp'n at 6, Defendants recently granted Plaintiffs' request for expedited treatment and have placed the coordinated requests of all the ACLU affiliates in the expedited processing queue, ahead of all non-expedited requests and later expedited requests. Thus, Defendants' response to Plaintiffs' request will proceed on the same track with or without the stay.

Further, Plaintiffs do not identify anything that will occur in this Court before the JPML's decision that would actually hasten the release of responsive documents. Though Defendants will process Plaintiffs' request "as soon as practicable," 6 C.F.R. § 5.5(e)(4), there is no reason to believe—particularly in light of the substantial volume of recent FOIA requests received by Defendants and the complexity of Plaintiffs' request—that production of all responsive records will be complete by the time the JPML decides Defendants' transfer motion.

Finally, Plaintiffs claim that the effect of granting Defendants' motion to stay would be to "suspend" "the very *judicial* accountability" established in FOIA, and "reinstate" "the *status quo ante*, in which agencies enjoyed the unsupervised discretion to comply with records requests." Pls.' Opp'n at 8. Plaintiffs' hyperbolic description of a temporary, weeks-long stay of proceedings while the JPML considers Defendants' motion to transfer is telling. Because, as discussed above, there would be no actual prejudice to Plaintiffs from the stay, Plaintiffs invent

an ulterior motive for the stay and speculate that that motive is to prejudice Plaintiffs and shield records from disclosure. But Defendants do not seek "to obtain a period of unfettered discretion," *id.* at 9; they merely seek to avoid the burden of simultaneously litigating thirteen parallel cases in thirteen different courts while a motion to consolidate the cases is pending.

II. SIMULTANEOUS AND DUPLICATIVE PROCEEDINGS IN THIRTEEN PARALLEL ACTIONS WILL IMPOSE AN UNNECESSARY BURDEN

As Defendants explained, proceeding in this case (and the other related cases) while their motion to transfer is pending forces Defendants to engage in simultaneous proceedings in thirteen separate cases before thirteen different courts. *See* Defs.' Mem. at 6-7. Plaintiffs disregard this burden as not a "real hardship" and claim that Defendants are only seeking to avoid "having to defend this action on a normal schedule." Pls.' Opp'n at 10.

But the burden on Defendants is plain. *See Virginia ex rel. Integra Rec LLC v. Countrywide Sec. Corp.*, No. 3:14CV706, 2015 WL 222312, at *3 (E.D. Va. Jan. 14, 2015) (noting that defendant would suffer hardship "without a stay, including their 'need to monitor and defend cases in multiple jurisdictions, on different schedules, when the cases may be consolidated to avoid that burden'" (quoting *Wood v. Johnson & Johnson*, No. WDQ-12-1572, 2012 WL 3240934, at *3 (D. Md. Aug. 3, 2012))). As a direct result of the ACLU's coordinated strategy to gerrymander these FOIA requests into thirteen separate cases, *see* Transfer Mot. at 4-8, Defendants must simultaneously answer complaints, appear in status conferences, confer with opposing counsel, and submit joint status reports in the thirteen related actions. In this action in particular, Defendants would, at a minimum, be required to respond to the complaint and confer with Plaintiffs on a discovery plan, and likely participate in a scheduling conference. This work would be duplicated in the other related actions and in the transferee court, and "litigating essentially the same claims in courts all over the country is no doubt burdensome." *Bd. of*

Trustees of Teachers' Retirement Sys. of Illinois v. Worldcom, Inc., 244 F. Supp. 2d 900, 905 (N.D. Ill. 2002).

Further, Plaintiffs' claim that answering the Complaint would not be wasted effort here because Defendants would need to answer the complaint regardless of the stay, Pls.' Opp'n at 11, ignores the effect that consolidation would have on this case. If the cases are consolidated, Defendants may not need to answer thirteen individual complaints at all, because the transferee court would likely require all of the ACLU affiliate plaintiffs to file a single amended consolidated complaint, which would require only one answer. *See, e.g.*, Manual for Complex Litigation § 20.132, at 224 n.668 (4th ed. 2004). And if the cases are transferred to Defendants' proposed forum, this action would be exempt under the local rules from any requirement to engage in a Rule 16 conference or confer on a joint discovery plan. *See* Transfer Mot. at 15. Thus, absent a stay, Defendants will be required to undertake time-consuming work—in as many as thirteen separate cases—that may otherwise prove unnecessary.

Moreover, Plaintiffs do not disclaim any intent to request either discovery or a production schedule while Defendants' transfer motion is pending. *See* Pls.' Opp'n at 10. Any decision that this Court may reach on these issues clearly may conflict with those of other courts and/or the transferee court. Defs.' Mem. at 6. Any such inconsistency would be plainly prejudicial—it would likely place competing demands on the same agency personnel responsible for processing the responses to the requests in each of the related cases. *Id.*[3] And, if Defendants' motion to

[3] Plaintiffs dispute this, suggesting that because the ACLU affiliates' requests only seek records from local field offices, only personnel in those field offices would be impacted. Pls.' Opp'n at 10. But that is not true. Because CBP headquarters is coordinating the processing of the ACLU affiliates' requests and because the requests seek identical categories of records, the same agency personnel would be responsible for determining the appropriate scope of searching, assessing whether certain categories of records should be withheld or redacted pursuant to FOIA's exemption, and preparing declarations regarding the reasonability of the search.

transfer is granted, Defendants would be forced to re-litigate these exact same issues before the transferee court. *Id.* at 6-7. Plaintiffs ignore this fact.

Finally, Plaintiffs' argue that the absence of "a single instance in which a stay was granted in a FOIA suit . . . reinforce[s] the inappropriateness of [a stay] here." Pls.' Opp'n at 10. But, as discussed above, transferor courts granted stays in the only two actions in which the JPML has considered centralizing a FOIA case. *See supra* Pt. I. Thus, there is nothing remotely "inappropriate[]" in finding that the burden on Defendants in time and expense from rearguing the same issues in different courts and the potential for inconsistent rulings justify a temporary stay pending a decision by the JPML on a motion to transfer. *See id.* (collecting cases); *see also, e.g.*, *Cooper v. Siddighi*, No. EDCV 13-00345 JGB (SPx), 2013 WL 12140988, at *4 (C.D. Cal. May 8, 2013); *Oregon ex rel. Kroger v. Johnson & Johnson*, No. 11-CV-86-AC, 2011 WL 1347069, at *6 (D. Or. Apr. 8, 2011); *Palmer v. Am. Honda Motor Co.*, No. CV 07-1904-PHX-DGC, 2008 WL 54914, at *1 (D. Ariz. Jan. 3, 2008).

III. A STAY WOULD SERVE JUDICIAL ECONOMY BY AVOIDING UNNECESSARY AND DUPLICATIVE PROCEEDINGS

Plaintiffs contend that structuring the litigation into thirteen overlapping actions in thirteen courts serves the interests of judicial efficiency. Pls.' Opp'n at 12-13. They argue that each of the related actions concern "highly differentiated, fact-specific, and local-context-driven" issues, and therefore "will not be efficiently [addressed] by a single tribunal." *Id.*

Plaintiffs' argument speaks more to whether transfer is appropriate than to whether this Court should stay proceedings while the JPML considers the appropriateness of transfer. There can be no doubt, however, that, if the case is transferred, any time this Court has devoted to pretrial proceedings will have been for naught. Any proceedings regarding issues such as production schedules and the availability of possible discovery will be substantially similar in

each of the related actions, and any ruling by this Court on those issues would ultimately be vitiated by the transferee court. *See* Defs.' Mem. at 5. A stay would make it unnecessary for the Court to devote its time to resolving any disputes over such pretrial matters. *Cf. Rivers v. Walt Disney Co.*, 980 F. Supp. 1358, 1360 (C.D. Cal. 1997) (granting stay in interests of judicial economy because absent stay "this Court will have needlessly expended its energies familiarizing itself with the intricacies of a case that would be heard by another judge").

Moreover, Plaintiffs' claim that denying a stay would somehow hasten the release of responsive, non-exempt records, *see* Pls.' Opp'n at 12-13, is unfounded. As discussed above, Plaintiffs have not identified any reason to believe that a brief, weeks-long stay, during which time Defendants would be continuing to process Plaintiffs' request, would delay the ultimate release of responsive records. *See supra* Pt. I.

Finally, Plaintiffs suggest that informal coordination of the separate actions would achieve "*appropriate* judicial efficiencies," citing an order denying a motion for designation of a coordinating judge in several related FOIA actions all brought in the United States District Court for the District of Columbia. Pls.' Opp'n at 14. Again, this argument goes to the appropriateness of the transfer, and not the appropriateness of a stay. In any event, there is a stark difference between the efficacy of informal coordination between judges in a single courthouse and the efficacy of informal coordination between thirteen judges in thirteen different courts all across the country. Moreover, the ACLU affiliates in this case have shown little regard for informal coordination, *see* Transfer Reply at 7-8 & n.6 (ECF No. 32-1), and their approach to the litigation thus far contradicts their vague assertion that they are "committed to collaborating and cooperating with the Agencies and the Plaintiffs in the Local Lawsuits to avoid any inefficiencies." Pls.' Opp'n at 14.

CONCLUSION

For the foregoing reasons and those stated in Defendants' opening Memorandum, this Court should grant Defendants' request for a temporary stay of proceedings.

Dated: June 6, 2017

Respectfully submitted,

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