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' OPPOSITION TO PLAINTIFFS' MOTION TO SET PRODUCTION SCHEDULE

INTRODUCTION

CBP is working diligently to process Plaintiffs' request—along with the 18 other ACLU affiliate requests—as soon as practicable. CBP has made four releases of responsive, non-exempt records, which include hundreds of pages of field office records, and has taken substantial steps to ramp up its processing of these requests, including migrating records to a new, more efficient document processing platform; applying a core list of search terms; and staffing up its review team. The review process for these requests, however, is time- and resource-intensive, particularly given the broad scope of the request, the large volume of records collected, and the complex review necessary for these records, many of which implicate privileged information, personally identifiable information, and sensitive law enforcement information exempt from disclosure under the FOIA. Additionally, although CBP has been and continues to seek additional resources for FOIA review, its resources are finite and have been stretched thin by an escalating number of requests, including many that, like Plaintiffs', concern Executive Order 13,769, "Protecting the Nation from Foreign Terrorist Entry Into the United

States," 82 Fed. Reg. 8977 (Jan. 27, 2017). Accordingly, the agency currently estimates that it can process on average 3,575 pages per month, across all of the 18 ACLU affiliate field office requests, of which Plaintiffs' is one. Each month, the processed pages would likely include records from each field office, so some fraction (which would vary each month) would contain records collected from custodians in the Chicago Field Office and corresponding local airports.

Given this context, a burdensome production schedule requiring CBP to satisfy a processing threshold for Chicago Field Office-specific records would disrupt its efforts and prejudice numerous other FOIA requesters. Such an order would not hasten the completion of the agency's processing of all of the ACLU affiliates' requests, and would likely slow the release of responsive, non-exempt records, as it would prevent CBP from structuring its review process in the most efficient and expeditious way. Moreover, such an order would have the effect of moving Plaintiffs' request ahead of earlier-filed expedited requests (and, for that matter, the other ACLU affiliates' requests), from which resources would need to be diverted. That result would be inconsistent with the agency's FOIA obligations and unfair to the FOIA requesters ahead of Plaintiffs in the processing queue—including other requesters who seek records related to the Executive Order—whose requests are no less important or time-sensitive than Plaintiffs'.

Instead, in light of CBP's expectation that it can process on average 3,575 pages per month across all the ACLU affiliate requests, the Court should permit CBP to process records at such a rate, and to order the parties to submit quarterly status reports, which will enable the Court to ensure that CBP continues to make progress in diligently processing these requests.

BACKGROUND

A. Statutory and Regulatory Framework

The FOIA requires federal agencies to make requested records "promptly available" to any person upon receiving a properly-filed request which "reasonably describes" the records

sought. 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).

Processing a FOIA request can be time-consuming. An agency must search for and collect potentially responsive records, and the time required for such a search necessarily depends on the scope and nature of the request and the agency's records systems. Once an agency has located potentially responsive records, it must process them for potential release. This requires careful review to assess responsiveness and to identify and withhold information falling within any of the nine statutory exemptions from disclosure. *See* 5 U.S.C. § 552(b). In addition, where records might implicate another agency's equities, that agency must be consulted before such records are released; these consultations take time and are not wholly within the control of the agency to which the FOIA request was directed. *See id.* § 552(a)(6)(B)(iii)(III).

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).[1] The FOIA "does not assign any particular time frame to release . . . the records sought."

[1] 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).

Landmark Legal Found. v. EPA, 910 F. Supp. 2d 270, 275 (D.D.C. 2012).[2] 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, resource considerations, consultations with other agencies, etc., "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; *Schweihs 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").

B. Plaintiffs' FOIA Request

Plaintiffs submitted their FOIA request to CBP on February 2, 2017. *See* Compl. Ex. A (ECF No. 1-1). Generally speaking, the request asks CBP to search its Chicago Field Office and the offices for numerous airports and ports of entry within the Chicago 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

[2] Although *Landmark Legal* and other cases cited herein concern denials of motions for preliminary injunctions, these cases are informative to Plaintiffs' motion. Plaintiffs' demand for a schedule by which CBP must complete processing of Plaintiffs' request is analogous to a demand for a mandatory injunction seeking the full relief requested in the Complaint. *See Graham v. Med. Mut. Of Ohio*, 130 F.3d 293, 295 (7th Cir. 1997) (defining mandatory injunction as "an injunction requiring an affirmative act by the defendant"); *see also Daily Caller v. DOS*, 152 F. Supp. 3d 1, 6-7 (D.D.C. 2015) (describing motion for immediate processing as seeking "the full relief [the plaintiff] seeks in filing its underlying Complaint").

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* Compl. Ex. A at 5-6.

On the same day, various other ACLU affiliates submitted 16 parallel requests seeking the 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. *See* Defs.' Notice of Mot. to Transfer Ex. 2, at 2-7 (ECF 19-3). In addition, the national ACLU organizations and their District of Columbia affiliate also submitted a FOIA request on February 2 seeking the same or similar categories of records, this time from CBP's headquarters. *See id.* Fifteen of these requests are now in litigation in 13 cases filed in 13 district courts throughout the country. *See id.* Ex.3 (ECF 19-4).

Because the various ACLU affiliates all seek substantially the same categories of records—indeed, in many instances, overlapping records—and were submitted in a "coordinated FOIA filing,"[3] CBP aggregated the requests pursuant to 5 U.S.C. § 552(a)(6)(B)(iv) and 6 C.F.R. § 5.5(d). *See* Pls.' Mem. in Supp. of Mot. to Set Produc. Schedule ("Pls.' Mem.") (ECF No. 55), Ex. 1 at 3 (ECF No. 55-1). Accordingly, 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 requests. In addition, due to the aggregation of the requests, CBP granted all of the ACLU affiliates' requests for expedited processing—placing their FOIA

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

requests in the expedited processing queue ahead of all non-expedited requests and later-filed expedited requests—and for fee waivers. *See id.* at 3-4.[4]

CBP's search for records from field office custodians collected approximately 103,000 records from 85 custodians. The agency also collected approximately 25,000 email records from custodians within CBP Headquarters, which are potentially responsive to the national ACLU organizations' request and contain records potentially responsive to the ACLU affiliates' requests. With respect to Plaintiffs' request in particular, the agency gathered approximately 11,200 potentially responsive record from 12 custodians.[5] The 11,200 email messages consist of all email messages to or from those custodians between January 27 and February 4, 2017. Plaintiffs have indicated that the records of four of these custodians—the Director of Field Operations, the Assistant Director of Field Operations, and the Port Directors for O'Hare International Airport and Minneapolis/St. Paul International Airport—should be prioritized.

In addition, CBP received lists of proposed search terms from six sets of ACLU plaintiffs, including Plaintiffs, which it then analyzed to derive a core list of search terms reasonably calculated to identify responsive records. Application of those search terms identified approximately 30,000 records totaling approximately 90,000 pages, including approximately 2,530 documents totaling approximately 7,300 pages held by the 12 identified custodians in the Chicago Field Office and local airports. As to the four prioritized custodians, the search terms identified approximately 1,820 documents totaling approximately 5,200 pages.

[4] Per their representation at the October 24, 2017 status conference, Defendants understand that Plaintiffs no longer challenge the decision to conduct a coordinated search for records. *See* Ex. 1 at 11:13-16.

[5] These custodians are the Director of Field Operations for the Chicago Field Office, the Assistant Director of Field Operations for the Chicago Field Office, and the Port Directors for O'Hare International Airport, Indianapolis International Airport, Des Moines International Airport, Louisville International Airport, Minneapolis/St. Paul International Airport, Lambert International Airport, Eppley Airfield, Port Columbus International Airport, General Mitchell International Airport, Kansas City International Airport, and Hopkins International Airport.

To date, the agency has made four releases of responsive records to Plaintiffs and the other ACLU affiliates, on July 14, July 26, September 21, and October 27, 2017. These releases total approximately 833 pages, and have substantially completed the agency's response to Parts 2-4 of all of the ACLU affiliates' requests.

While CBP's collection and processing efforts were ongoing, it moved to consolidate the 13 parallel ACLU affiliate cases into a single multi-district litigation. 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." Order at 1 (ECF No. 44). The Panel neither mentioned nor "rejected," Pls.' Mem. at 3, 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.

ARGUMENT

I. THE COURT SHOULD PERMIT THE AGENCY TO CONTINUE TO PROCESS PLAINTIFFS' REQUEST AS SOON AS PRACTICABLE.

CBP is working expeditiously to both process the substantial volume of records that are potentially responsive to the ACLU affiliates' requests and to identify and implement ways to accelerate this process. In doing so, it is necessarily constrained by the complexities of the FOIA review process, the agency's limited resources, and an escalating number of FOIA requests and court-imposed production requirements. In light of these burdens, Plaintiffs' "effort to accelerate review of [their] request[] necessarily will displace in processing priority those of third parties who submitted equally urgent requests *before* the plaintiff[s]," *Daily Caller*, 152 F. Supp. 3d at 15, and will monopolize resources needed to process other ACLU affiliates' requests. Given CBP's estimate that it can process on average 3,575 pages per month, the Court should instead permit CBP to continue processing Plaintiffs' request along with the other ACLU affiliates

requests at such rate; to release responsive, non-exempt records on a rolling basis until processing of the records identified by the core list of search terms is complete; and to provide quarterly status reports on its progress to the Court.

A. CBP's Estimated Average Monthly Processing Rate of 3,575 Pages Across All ACLU Field Office Requests Reflects the Agency's Best Efforts to Process the Requests as Soon as Practicable Under the Circumstances.

For an expedited request like Plaintiffs', 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; exemption issues; other agencies or components which must be consulted or to which documents might have to be referred for additional review; and the resources available to process the request. Here, based on those considerations, the agency currently estimates that it will be capable of processing, on average, approximately 3,575 pages per month across all of the ACLU field office requests, and will release the responsive, non-exempt records on a rolling basis. As set forth in the declaration of Patrick A. Howard, attached as Exhibit 2, a processing rate exceeding 3,575 pages per month is impracticable under the current circumstances.

First, CBP's review process for requests like Plaintiffs' is complex and takes time to conduct properly in accordance with CBP's legal obligations. Ex. 2 ¶¶ 25-33. The records potentially responsive to the ACLU affiliates' field office requests include substantial amounts of information exempt from disclosure under one or more of the FOIA's nine statutory exemptions, including information that is privileged, 5 U.S.C. § 552(b)(5); implicates personal privacy, *id.* § 552(b)(6); and was compiled for law enforcement purposes, *id.* § 552(b)(7). Ex. 2 ¶ 26. The records also contain information in which other agencies and DHS components have equities, requiring inter- and intra-agency consultation to ensure appropriate exemptions are asserted. *Id.*

Given the complexity of the issues raised by review of these records, CBP employs a

multi-level review process. *Id.* ¶ 28. Each record is reviewed by a first-level reviewer for responsiveness and for initial, proposed redactions. *Id.* ¶ 29. None of these first-level reviewers are attorneys, and many have been detailed to this project and thus have little prior experience with the FOIA. *Id.* ¶¶ 8, 43-44. A second-level reviewer reviews the proposed responsiveness decision and redactions for consistency and accuracy. *Id.* ¶ 29. Each record is then subject to legal review by attorneys in CBP's Office of Chief Counsel. *Id.* ¶ 30. These attorneys also identify records that implicate the equities of other agencies or DHS components. *Id.* None of these attorneys are solely responsible for FOIA matters and must balance their FOIA processing obligations with their non-FOIA responsibilities. *Id.* ¶ 31.[6] Only once all of these stages of review are completed can responsive, non-exempt records be released to the requester (and made available to the public, *see* 5 U.S.C. § 552(a)(2)(d)(i)). Ex. 2 ¶ 33.

As a result, 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 (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.* at 539-40. 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.

[6] Notably, CBP is employing reviewers and attorneys located in field offices, as well as at Headquarters. *Id.* ¶ 28. Thus, any suggestion that the decision to conduct a coordinated, single search for responsive records has limited the agency's application of its FOIA resources, *see* Pls.' Mem. at 6, is meritless.

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. Ex. 2 ¶ 8. 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.* ¶ 16. 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 "Protective the Nation from Foreign Terrorist Entry Into the United States." *Id.* ¶ 18. Over 90 of these requests are still open and being processed, and at least 21 of these are in litigation in district courts across the country. *Id.* At the same time, the agency has received approximately 90 requests related to the President's proposed Border Wall, 52 of which are still open and four of which are currently in litigation. *Id.* ¶ 21. And these requests are in addition to the thousands of simple FOIA requests the agency has received from individuals this year. *Id.* ¶¶ 13, 16. Therefore, 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.

Finally, Plaintiffs' request—like those of the other ACLU affiliates—seeks all records (which is broadly defined) "concerning" the "interpretation, enforcement, and implementation" of the Executive Order and "[a]ny other judicial order or executive directive issued regarding the Executive Order." Compl. Ex. A at 5-6. Accordingly, these requests are problematically broad, *see, e.g.*, *Dale v. IRS*, 238 F. Supp. 2d 99, 104 (D.D.C. 2002) ("[C]ourts have found that FOIA requests for *all* documents concerning a requester are too broad."); *Massachusetts v. HHS*, 727 F. Supp. 35, 36 n.2 (D. Mass. 1989) ("A request for all documents 'relating to' a subject is usually

subject to criticism as overbroad . . . ."), and have imposed substantial burdens on CBP given the volume of potentially responsive records. The agency has tried, without success, to negotiate the scope of these requests with the ACLU affiliates. Notwithstanding CBP's belief that it has valid grounds for denying Plaintiffs' request in part on the basis of this overbreadth, the agency is processing the request in good faith as it interprets it.

Notably, the agency's estimated processing rate reflects its best guess of its processing capabilities at this time, based on its current level of resources, levels of staffing, FOIA experience of its reviewers, and competing FOIA and litigation obligations. Ex. 2 ¶ 36. The agency anticipates this rate will increase as the review process ramps up due to any number of factors, including reviewers' increased experience with the FOIA and the particular records at issue; changes in the agency's competing FOIA obligations; discussions with Plaintiffs and other ACLU affiliates' to narrow the scope of their requests; and faster-than-expected processing gains from streamlining review of similar records. *Id.* ¶ 41. However, at this time, given the current circumstances, the agency estimates that it can process 3,575 pages on average per month.

B. The Court Should Not Enter a Production Schedule in Light of Defendants' Estimated Processing Rate of 3,575 Pages per Month.

Although they do not propose a processing schedule themselves, Plaintiffs ask the Court to "set a schedule" for the processing of responsive, non-exempt records specific to the Chicago Field Office and corresponding local airports. *See* Pls.' Mem. at 1; *id.* at 6.[7] Though counsel for the ACLU affiliates represented to the JPML that formal coordination through the MDL process was unnecessary because the ACLU affiliates would informally coordinate, *see* Pls.' Notice of

[7] Should Plaintiffs propose a particular schedule, or any other relief, in the first instance in a forthcoming Reply, Defendants object to their doing so, as it provides Defendants with no meaningful opportunity to respond. *See, e.g., Griffin v. City of Chicago*, 406 F. Supp. 2d 938, 942 (N.D. Ill. 2005) ("It is well settled that '[r]aising an issue for the first time in reply is improper, as it deprives the opposing party of a meaningful chance to respond.'" (quoting *Peterson v. Knight Architects, Eng'rs, Planners, Inc.*, No. 97 C 1439, 1999 WL 1313696, at *13 (N.D. Ill. Nov. 4, 1999)).

Opp'n & Joinder, at 17-18 (ECF No. 30-1), Plaintiffs now suggest that the Court should ignore the demands placed on CBP by the other ACLU affiliate cases and set a processing schedule requiring the agency to prioritize the 5,200 pages of potentially responsive records for the four prioritized custodians (or potentially the 7,300 pages of potentially responsive records for all 12 custodians). But an order requiring the agency to satisfy specific, substantial processing thresholds for particular field office records would only serve to delay the ultimate release of records to all of the ALCU affiliates and would prejudice other requesters, including the other ACLU affiliates and numerous FOIA requesters whose requests pre-date Plaintiffs'. Instead, Defendants respectfully request that the Court (1) permit CBP to continue to process Plaintiffs' request along with the other ACLU affiliates' request (which the CBP currently estimates it can accomplish at an average monthly rate of 3,575 pages) and release the responsive, non-exempt records on a rolling basis, and (2) order the parties to submit quarterly joint status reports so that the Court may supervise the agency's progress and adjust accordingly to any changes to the agency's estimated processing rate.

Plaintiffs' demand for a processing schedule tied to Chicago-specific records 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* Ex. 2 ¶ 35. The agency believes that it 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. *Id.* ¶¶ 37-40. Deferring to the agency's assessment as to how best it can process the records would allow 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 exemptions. *Id.* ¶¶ 39-40. Not only would this expedite the ultimate release of responsive records to all ACLU affiliates, it would better ensure consistent and accurate treatment of exempt information, much of which could implicate sensitive law enforcement information and/or privacy rights of individual travelers. *Id.* ¶ 37; *see also Daily Caller*, 152 F. Supp. 3d at 14 (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 as efficiently as possible.

Moreover, given the finite nature of CBP'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 resources to their request. Plaintiffs' request was already granted expedited treatment, which moved it ahead of all non-expedited FOIA requests. Ex. 2 ¶ 51. Ordering CBP to give additional preference to Plaintiffs' request would necessarily come at the expense of the other requests in the expedited queue—including multiple other requests concerning the Executive Order—from which agency resources would be diverted and which are no less important or time-sensitive than Plaintiffs'. *See, e.g.*, *Daily Caller*, 152 F. Supp. 3d at 15 ("[T]he plaintiff's effort to accelerate review of its requests necessarily will displace in processing priority those of third parties who submitted equally urgent requests *before* the plaintiff."); *EPIC v. DOJ*, 15 F. Supp. 3d 32, 47 (D.D.C. 2014) (given finite agency resources, "allowing EPIC to jump to the head of the line would upset the agency's processes and be detrimental to the other expedited requesters"); *cf. Caifano v. Wampler*, 588 F. Supp. 1392, 1394 (N.D. Ill. 1984) (holding that ordering agency to prioritize plaintiff's request would "'vault' plaintiff's request over the requests of other individuals who

were ahead of him in the FOIA line but who did not seek judicial relief," which "would unfairly prejudice those other individuals"); *Schweihs*, 933 F. Supp. at 723.

Indeed, Plaintiffs' demand could exhaust the agency's processing capabilities for the ACLU affiliate requests. In recent days, the agency has received production orders in two of the parallel actions, which combined require the agency to process approximately 8,560 pages in the next three months. *See* Order, *ACLU of Washington v. DHS*, No. C17-00562-MJP (W.D. Wash. Oct. 20, 2017) (ECF No. 36) (ordering processing of 1,000 pages in each of next two months, and remaining approximately 4,100 pages in third month); Order, *ACLU of Michigan v. DHS*, No. 5:17-cv-11149 (E.D. Mich. Oct. 26, 2017) (ECF No. 42) (ordering processing of 820 pages per month and productions on rolling basis until complete). These orders monopolize approximately 80% of the agency's total estimated FOIA processing capability for the ACLU affiliates' requests during those months. Another similar burdensome order here would effectively force the other ACLU affiliates to wait in the back of the line and/or do the same to other FOIA requesters ahead of Plaintiffs in the expedited processing queue.

C. CBP Has Released Records Responsive to Plaintiffs' Request.

Finally, Plaintiffs again suggest that CBP has not produced any records responsive to their request, *see, e.g.*, Pls.' Mem. at 3 ("Defendants have not produced a single record from a single local custodian at issue in this lawsuit."); *see also id.* at 4, which is not correct. CBP's July 14, 2017 release included a spreadsheet containing non-exempt information regarding all travelers subject to secondary inspection pursuant to the Executive Order, and identifying the processing location for each such traveler, including, in relevant part, travelers encountered at O'Hare, Chicago Midway, and Minneapolis-Saint Paul airports. Plaintiffs have never explained how this information is not directly responsive to Parts 2-4 of their request, which seek aggregate data about the number of individuals who were subject to the Executive Order at local airports.

In addition, CBP has released numerous records responsive to Parts 1(b) and 5 of Plaintiffs' request, which seek "[r]ecords containing the 'guidance' that was 'provided to DHS field personnel shortly' after" the issuance of the Executive Order, *see* Compl. Ex. A at 5, 7, including communications between personnel in CBP Headquarters and personnel in the Chicago Field Office. Plaintiffs appear to suggest that these emails are somehow not "local" documents, Pls.' Mem. at 3, presumably because CBP collected and released the particular version found in the files of the Headquarters custodian as opposed to the identical version found in the files of the field office custodian. But Plaintiffs' distinction between "locally-held" records and Headquarters "held" records, *see id.* at 3-4, is a distinction without a difference as to electronic documents. An email between personnel in CBP Headquarters and personnel in the Chicago Field Office is, by its nature, *both* a Headquarters and local record. FOIA does not require the agency to release multiple or duplicate versions of the same record, just because Plaintiffs want the version the agency collected from someone in Chicago rather than someone in Washington. *See, e.g.*, *Defs. of Wildlife v. Dep't of Interior*, 314 F. Supp. 2d 1, 10 (D.D.C. 2004) ("[I]t would be illogical and wasteful to require an agency to produce multiple copies of the exact same document."); *see also Jett v. FBI*, 139 F. Supp. 3d 352, 365 (D.D.C. 2015).[8]

CONCLUSION

For the foregoing reasons, this Court should enter an order permitting CBP to continue processing Plaintiffs' request and directing the parties to submit quarterly joint status reports.

[8] Plaintiffs' logic would lead to absurd outcomes, given the overlap in records across the ACLU affiliate cases. The agency has reviewed numerous emails that were sent to personnel in multiple field offices. Per Plaintiffs' theory, CBP would need to process and release an email collected from the files of a Chicago Field Office custodian in this case, an identical version of that email from the files of a Boston Field Office custodian in the case in the District of Maine, an identical version from the files of a Portland Field Office custodian in the case in the District of Oregon, and so on for every field office. That outcome would only delay the release of records and unnecessarily burden the agency, and is inconsistent with the purposes and requirements of the FOIA.

Dated: November 6, 2017

Respectfully submitted,

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