

December 8, 2017

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

Re: American Civil Liberties Union of Maine, et al. v. United States Customs and Border Protection, et al., Case No. 17-132-GZS

Dear Judge Rich,

Pursuant to the November 24, 2017 order, the Plaintiffs submit this letter brief regarding the two questions asked by the Court: (1) whether the government's document production should be specific to this Freedom of Information Act (FOIA) case or coordinated nationally with other cases, and (2) "the appropriate pace" for the government's processing. Order, ECF No. 34. As discussed below, (1) the production must be responsive to the FOIA request underlying this specific litigation, not other FOIA requests in different cases, and (2) the government should complete processing the documents by mid-January 2018, or, at the very least, at a rate of 820 documents per month with a hard deadline of November 2, 2018.

### **BACKGROUND**

On January 27, 2017, President Trump issued Executive Order 13,769 (EO-1), which temporarily banned nationals from seven predominantly Muslim countries and all refugees from entering into the United States.<sup>1</sup> Days later, on February 2, 2017, the ACLU of Maine and other New England ACLU affiliates filed a FOIA request seeking information about the local implementation of EO-1. Compl. at Exh. 1, ECF No. 1-1 (Apr. 12, 2017). The request sought information related to "international airports within the purview of the Boston Field Office." *Id.*

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<sup>1</sup> <https://www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states> (last accessed Dec. 8, 2017).

at 1. When the government failed to respond, the requesters filed suit. Compl., ECF No. 1 (Apr. 12, 2017).

Counsel for the government sought to consolidate this litigation with other pending litigation nationwide over the failure to respond to FOIA requests concerning EO-1, but on August 2, 2017, the Judicial Panel on Multidistrict Litigation (MDL panel) denied the government's motion to consolidate. Order, ECF No. 21 (Aug. 2, 2017). In denying consolidation, the panel reasoned that "the actions are brought by separate plaintiffs (albeit all ACLU affiliates), and each FOIA request targets a different CBP office." *Id.* at 2.

It has now been over 10 months since the original FOIA request, and the government has failed to process or produce the vast majority of documents relating to the local international airports in New England.

## DISCUSSION

### I. Production Should Be Case Specific

The Court should order case-specific, rather than nationwide, processing and production. Such an order would not dictate the procedures the government may use in processing relevant documents. Instead, it would simply provide a timetable for the government's processing and production of the documents specific to this FOIA litigation—whatever the procedures used. There are three primary reasons for this conclusion: (1) by statute, an individual FOIA case relates only to the specific FOIA request underlying it, (2) although multiple FOIA lawsuits could be consolidated in a single district, the MDL panel denied consolidation and the government cannot evade that ruling through a scheduling order, and (3) in similar circumstances, other courts have issued case-specific orders.

First, the Court's authority in a FOIA case extends to "any agency records improperly withheld from *the complainant*." 5 U.S.C. § 552(a)(4)(B) (emphasis added). Here, the complainants are the New England ACLU affiliates, and they seek records related to implementation of EO-1 at local "international airports within the purview of the Boston Field Office." Compl. Exh. 1 at 1, ECF No. 1-1. Accordingly, the appropriate scope of pretrial proceedings is limited to the records

that the government has identified as potentially responsive to that specific request—namely, records from “seven custodians in the Boston Field Office and corresponding local airports.” Joint Status Report at 5, ECF No. 30 (Nov. 1, 2017) (Joint Status Report). From those custodians, the government has identified a modest quantity of “potentially responsive email messages and attachments,” made even smaller by the application of search terms. *Id.* at 5-7.<sup>2</sup> Any scheduling order should be specific to those limited records that the government has identified as potentially responsive in this case.

The government argues that the Court should instead order nationwide processing and production. *See, e.g.*, Joint Status Report at 3. But such an order would extend to separate FOIA requests filed by different “complainant[s].” 5 U.S.C. § 552(a)(4)(B). For instance, ACLU affiliates from Michigan, Illinois, California, and other states (all of which are separate entities than the New England ACLU affiliates) filed separate FOIA requests relating to the local international airports in their regions.<sup>3</sup> Records that are potentially responsive to those separate requests are not within the ambit this case proceeding in the District of Maine. As such, those cases, complainants, and records are not the appropriate subjects of a scheduling order in this Court.

Second, the Court should reject the government’s attempt to relitigate its unsuccessful motion to consolidate. *See* Order, ECF No. 21 (Aug. 2, 2017). By statute, civil actions in different districts “may be transferred to any district for coordinated or consolidated pretrial proceedings.” 28 U.S.C. § 1407(a). Such transfer

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<sup>2</sup> The government also identified a similar quantity of potentially duplicative emails from custodians at CBP Headquarters to the local custodians and corresponding local airports. *Id.* at 5 & n.2. The Plaintiffs do not concede that these custodians and emails comprise the total universe of potentially responsive records. Records in the TECs database, for example, may also be responsive. Such disputes, however, can be litigated at summary judgment, and do not implicate the issues on which the Court ordered additional briefing.

<sup>3</sup> *See, e.g.*, Order, *ACLU of Washington v. DHS*, Case No. 17-562, ECF No. 36 (W.D. Wa. Oct. 20, 2017) (Exh. 1); Order, *ALCU of Michigan v. DHS*, No. 17-11149, ECF No. 42 (S.D. Mich., Oct. 26, 2017) (Exh. 2); Order, *ACLU of San Diego & Imperial Counties v. DHS*, No. 17-733, ECF No. 53 (S.D. Cal. Nov. 6, 2017) (Exh. 3); Order, *ACLU of Illinois v. DHS*, No. 17-2768, ECF No. 73 (N.D. Ill. Nov. 21, 2017) (Exh. 4).

is permitted when the actions involve “one or more common questions of fact” and consolidation would promote “the convenience of parties and witnesses” and “the just and efficient conduct of such actions.” *Id.* In this case, the government filed a motion to consolidate this case with 12 other actions, arguing that “consolidation will alleviate the inefficiencies posed by litigating substantially similar cases in thirteen different districts. Gov. Mot., MDL No. 2786, ECF No. 1-1 (May 8, 2017).

The MDL panel rejected the government’s argument, reasoning that any overlapping issues between the 13 separate cases “appear relatively straightforward and unlikely to entail extensive pretrial proceedings.” Order, ECF No. 21 at 1 (citation omitted). In response to the government’s argument that consolidation “would reduce litigation costs,” the MDL panel held that “the potential for litigation cost savings, without more,” is insufficient, especially “where, as here, there is little likelihood of complex pretrial proceedings.” *Id.* at 2. Accordingly, the panel rejected the government’s motion for “coordinated or consolidated pretrial proceedings” under 28 U.S.C. § 1407.

This case thus proceeds separately and independently. As such, any scheduling order should reach no more broadly than the dispute in this case—which is limited to the local international airports cited in the FOIA request. Compl. Exh. 1 at 1, ECF No. 1-1.

The government argues that the Court should instead order nationwide processing. Yet the case-specific nature of pre-trial orders is precisely the reason for the MDL panel in the first place—because streamlining separate cases in different districts requires consolidation and transfer. 28 U.S.C. §1407. The MDL panel has already denied such consolidation here. Accordingly, the pretrial orders in this case must remain case-specific—not nationwide—in scope.

Third, the other courts to decide the issue have ordered case-specific processing. In the *ACLU of Washington v. DHS*, for example, the court ordered the government to process 1,000 pages per month “of the Records identified as potentially responsive to Plaintiffs’ FOIA request”—i.e., the request underlying that specific case. Order, Case No. 17-562, ECF No. 36 (W.D. Wa. Oct. 20, 2017) (Exh. 1).

The court in *ALCU of Michigan v. DHS* similarly ordered the government to process 820 pages per month from custodians in the Detroit field office. Production Order, No. 17-11149, ECF No. 42 (S.D. Mich., Oct. 26, 2017) (Exh. 2). The court issued similar orders in *ACLU of San Diego & Imperial Counties v. DHS*, No. 17-733, ECF No. 53 (S.D. Cal. Nov. 6, 2017) (Exh. 3), and *ACLU of Illinois v. DHS*, No. 17-2768, ECF No. 73 (N.D. Ill. Nov. 21, 2017) (Exh. 4).

The Plaintiffs are not aware of any similar case in which a court ordered nationwide production. Although the government previously stated that a case in the Northern District of Georgia adopted its nationwide approach, the order made no such ruling. Instead, the court in Georgia ruled in the government's favor on other issues such as "search terms, custodians, and proposed date range," but requested further input from the parties regarding processing and production. Order, Case No. 17-1309, ECF No. 36 (Nov. 8, 2017). Indeed, the government's *post-order* submission advocates for nationwide production (over the objection of plaintiffs seeking case-specific production), confirming that the issue remains undecided in Georgia. Gov. Proposal at 3-4, Case No. 17-1309, ECF No. 37 (Nov. 21, 2017). Accordingly, the other courts to consider the issue have ordered case-specific, rather than a nationwide, production. This Court should do the same.

## **II. The Government Should Expeditiously Process This Request**

When considering the appropriate processing rate, this Court should start with the fact that this FOIA request was filed over ten months ago, on February 2, 2017. Since then, the government has identified a modest quantity of documents potentially responsive to our request. Joint Status Report at 5. Aside from approximately 10 pages, the government has not yet produced emails or other records related to the Boston Field Office. Given the modest quantity of records at issue (as detailed below), the government should be able to complete processing in a matter of weeks. At the very least, however, the government should process records at a rate of 820 pages per month, with a hard deadline of November 2, 2018. The parties can then proceed to summary judgment regarding whether the government correctly identified and produced all non-exempted, responsive records.

The government has identified a small quantity of documents potentially responsive to our FOIA request. Specifically, it identified less than 10,000 potentially responsive email messages and attachments, pertaining to seven custodians in CBP's Boston Field Office. Joint Status Report at 5. After applying search terms, the quantity of potentially responsive documents dwindled to 2,804 documents (less than 9,000 pages). *Id.* at 6. Although the Plaintiffs do not concede that the search terms selected by the government are legally adequate, both parties agree that such disputes are properly resolved at summary judgment. *Id.* at 7.

The government should be able to process this modest quantity of documents within a matter of weeks. As previously described, reviewing 9,000 documents in a week is standard fare for a Maine attorney. Joint Status Report at 8-9. Providing the government until mid-January 2018 to process the 2,804 documents (and less than 9,000 pages) at issue here should provide ample time. *See id.* at 11 (requesting a deadline of January 19, 2018).

At the very least, however, the Court should order the government to process 820 pages per month, with a deadline of November 2, 2018, to complete all processing. Other courts have ordered an even higher processing rate with a hard deadline. In *ACLU of Washington*, for example, the court ordered the government to process 1,000 pages per month with a hard deadline of January 16, 2018, to complete processing and production. Case No. 17-562, ECF No. 36 (Oct. 20, 2017). And in *ACLU of San Diego & Imperial Counties*, the court ordered a processing rate of 1,000 pages per month, to be completed no later than April 6, 2018. No. 17-733, ECF No. 53 (S.D. Cal. Nov. 6, 2017); *see also ACLU of Oregon v. DHS*, Case No. 17-575, ECF No. 31 (Nov. 6, 2017) (ordering completion by May 31, 2018). Imposing an even gentler requirement here would require the government to process 820 pages per month, with a monthly status report detailing progress on the second day of each month (or the business day immediately after). The government would have 11 months from January 2, 2018, to complete processing of the less-than-9,000 potentially responsive pages, with a hard deadline of November 2, 2018—over one and one-half years from the date the Plaintiffs' FOIA request was filed.

A November 2, 2017 deadline (at the latest) is necessary to comply with FOIA's requirement for prompt and open disclosure. The FOIA statute requires government agencies to make requested records "promptly available," unless one of the nine narrow exemptions applies. *Church of Scientology Int'l v. U.S. Dep't of Justice*, 30 F.3d 224, 228 (1st Cir. 1994) (citing 5 U.S.C. § 552(a)(3), (b)). The purpose of the FOIA is "to open agency actions to the light of public scrutiny" and the policy is "one of broad disclosure." *Id.* (quoting *Dep't of Justice v. Reporters Committee*, 489 U.S. 749, 772 (1989)). Given the modest quantity of records involved, ordering the government to complete processing by November 2017 would not be onerous, and is the very least the government can do to comply with FOIA's requirement to make records "promptly available." 5 U.S.C. § 552(a)(3), (b).

The government argues that there is a difference between "processing" and "production." The Plaintiffs agree to the following extent. If the Court adopts the 820-rate, that rate would be apply to "processing"—requiring the government to process at least 820 pages per month (with the hard deadline of November 2, 2017), and to produce the resulting non-exempt, responsive information. The monthly production should be accompanied by a status report stating (1) the number of hours spent in processing, and (2) a Vaughn index listing the reason for any claimed exemption for withheld documents. *See Church of Scientology*, 30 F.3d at 228–29 (citation omitted) (stating that a Vaughn index "is viewed as necessary to protect the adversary process in a FOIA case, in which only the party opposing disclosure will have access to all the facts"); *cf.* 32 CFR § 701.39 (Navy regulation setting forth required contents of Vaughn index). With those caveats, the Plaintiffs agree that "processing" 820 pages per month may not result in the government "producing" 820 pages.

## CONCLUSION

For these reasons, the Plaintiffs respectfully request that the Court issue a case-specific scheduling order requiring, at the very least, that the government process 820 pages per month with a deadline of November 2, 2018.

Very truly yours,

/s/Zachary L. Heiden

Zachary L. Heiden

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The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

AMERICAN CIVIL LIBERTIES UNION OF  
WASHINGTON, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF  
HOMELAND SECURITY, et al.,

Defendants.

No. C17-00562-MJP

**ORDER**

This matter came before the Court for a Status Conference on October 17, 2017. Plaintiffs were represented by Eric M. Stahl and Defendants were represented by Jason Lee.

The Court orders as follows:

1. By no later than **October 25, 2017**, Plaintiffs shall provide Defendants with their suggested search terms to assist Defendants in identifying records responsive to Plaintiffs' FOIA request from the approximately 4,700 email records Defendants have identified to date from the four custodians in the U.S. Customs and Border Protection Seattle Field Office (the "Records").

2. By no later than **November 18, 2017**, Defendants shall have (i) reviewed for responsiveness and for information exempt from disclosure under the FOIA the first 1,000 pages of the Records identified as potentially responsive to Plaintiffs' FOIA request, located

1 through Defendants' search of email records from custodians in the Customs and Border  
2 Protection ("CBP") Seattle Field Office, and (ii) produced to Plaintiffs responsive, non-exempt  
3 records identified in this review and identified any asserted exemptions.

4 3. By no later than **December 18, 2017**, Defendants shall have (i) reviewed for  
5 responsiveness and for information exempt from disclosure under the FOIA the next 1,000  
6 pages of the Records identified as potentially responsive to Plaintiffs' FOIA request, located  
7 through Defendants' search of email records from custodians in the CBP Seattle Field Office,  
8 and (ii) produced to Plaintiffs responsive, non-exempt records identified in this review and  
9 identified any asserted exemptions.

10 4. By no later than **January 16, 2018**, Defendants shall have (i) reviewed for  
11 responsiveness and for information exempt from disclosure under the FOIA any remaining  
12 pages of the Records identified as potentially responsive to Plaintiffs' FOIA request, located  
13 through Defendants' search of email records from custodians in the CBP Seattle Field Office,  
14 and (ii) produced to Plaintiffs responsive, non-exempt records identified in this review and  
15 identified any asserted exemptions..

16 5. By **January 31, 2018**, the parties shall submit a joint status report and proposed  
17 case schedule to the Court, addressing (without limitation):

- 18 a. The status of Defendants' response to Plaintiffs' FOIA request, and  
19 b. A proposed briefing schedule for dispositive motions, if appropriate.

20 Dated this 20th day of October 2017.

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24 Marsha J. Pechman  
25 United States District Judge  
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Presented by:

Davis Wright Tremaine LLP

United States Department of Justice

By /s/Eric M. Stahl

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*Attorney for Defendants  
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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that on October 19th, 2017, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the attorneys of record registered on the CM/ECF system. All other parties (if any) shall be served in accordance with the Federal Rules of Civil Procedure.

DATED this 19th day of October, 2017.

/s/Eric M. Stahl

Eric M. Stahl, WSBA #27619

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

American Civil Liberties Union of  
Michigan,

Plaintiff,

v.

U.S. Department of Homeland  
Security and U.S. Customs and  
Border Protection,

Defendants.

Case No. 17-cv-11149

Judith E. Levy  
United States District Judge

Mag. Judge Elizabeth A. Stafford

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**ORDER REGARDING PRODUCTION OF DOCUMENTS FROM  
INITIAL CUSTODIANS AND SUPPLEMENTAL BRIEFING**

On October 26, 2017, the Court held a telephonic status conference regarding outstanding issues related to plaintiff's Freedom of Information Act ("FOIA") requests. During that conference, the Court was informed that defendants have used search terms provided by plaintiff to narrow the scope of their FOIA requests as to six identified custodians relevant to this case to 1,600 records totaling 4,100 pages.

The Court hereby orders that:

By November 27, 2017, defendants will review for responsiveness and for information exempt from disclosure under the FOIA the first 820 pages of the records identified as potentially responsive to plaintiff's FOIA requests, located through defendants' search of email records from the six identified custodians in the Customs and Border Protection ("CBP") Detroit Field Office. By that date, defendants will also produce to plaintiffs responsive, non-exempt records identified in this review and identify any asserted exemptions.

Defendants will repeat this process subject to the above requirements each successive month for each successive batch of 820 documents, with each batch to be reviewed and produced by the 27<sup>th</sup> of each month, or by the next business day if the 27<sup>th</sup> of the month falls on a weekend or a holiday.

By April 27, 2018, the parties will submit a joint status report to the Court, addressing the status of defendants' response to plaintiff's FOIA requests.

The parties are ordered to provide supplemental briefing regarding two other issues: first, whether defendants should be required to produce Microsoft Excel files in their original, native format,

and second, whether and how the government should be required to produce individual records from the TECS system database. Plaintiff may file a brief of no more than fifteen pages on or before November 9, 2017, defendants may file a responsive brief of no more than fifteen pages on or before November 28, 2017, and plaintiff may file a reply brief of no more than seven pages by December 8, 2017.

The Court will address plaintiff's request to file a motion for partial summary judgment regarding the date cutoff the government seeks to apply to the FOIA requests in a subsequent order.

IT IS SO ORDERED.

Dated: October 26, 2017  
Ann Arbor, Michigan

s/Judith E. Levy  
JUDITH E. LEVY  
United States District Judge

### **CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on October 26, 2017.

s/Shawna Burns  
SHAWNA BURNS  
Case Manager

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

American Civil Liberties Union of San  
Diego and Imperial Counties,  
  
Plaintiff,  
  
v.  
  
U.S. Department of Homeland Security,  
et al.,  
  
Defendants.

Case No.: 17-cv-00733-L-JLB

**SCHEDULING ORDER**

Pursuant to Rule 16.1(d) of the Local Rules, a Case Management Conference was held on **November 6, 2017** regarding Plaintiff's Freedom of Information Act ("FOIA") requests. After consulting with the attorneys of record for the parties and being advised of the status of the case, and good cause appearing, **IT IS HEREBY ORDERED:**

1. By **December 6, 2017**, Defendants shall process the next 1,000 pages of the records identified as potentially responsive to Plaintiff's FOIA requests. Also by **December 6, 2017**, Defendants shall: (1) produce to Plaintiff all responsive, non-exempt records identified in this review; (2) identify any asserted exemptions; and (3) provide Plaintiff with written confirmation that at least 1,000 pages were processed and a page count for the number of potentially responsive pages that remain to be processed.

Defendants will repeat this process subject to the above requirements each successive month for each successive batch of 1,000 pages, with each batch to be reviewed and produced by the 6th of each month, or by the next business day if the 6th of the month falls on a weekend or a holiday. Defendants represent that, with respect to Plaintiff's FOIA requests, there are "approximately 1,540 records totaling approximately 4,300 pages (not

1 including spreadsheets).” (ECF No. 51 at 5.) Defendants’ production shall be completed  
2 no later than **April 6, 2018**.

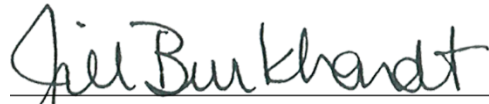
3 2. By **April 30, 2018**, the parties shall file a Supplemental Joint Discovery Plan  
4 that provides both a status update and a proposed deadline for the parties to file cross-  
5 motions for summary judgment.

6 3. A second Case Management Conference (“CMC”) pursuant to Fed. R. Civ. P.  
7 16(b) is SET for **May 7, 2018** at **11:00 AM** before Magistrate Judge Jill L. Burkhardt. The  
8 CMC shall be a **telephonic**, counsel-only Conference. Plaintiff’s principal attorney  
9 responsible for the litigation is responsible for placing one joint call with all participating  
10 counsel already on the line into Judge Burkhardt’s Chambers at (619) 557-6624.

11 4. The parties must review the chambers’ rules for the assigned district judge  
12 and magistrate judge.

13 **IT IS SO ORDERED.**

14 Dated: November 6, 2017

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17 Hon. Jill L. Burkhardt  
18 United States Magistrate Judge  
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**UNITED STATES DISTRICT COURT  
FOR THE Northern District of Illinois – CM/ECF LIVE, Ver 6.2.1  
Eastern Division**

American Civil Liberties Union of Illinois, et al.

Plaintiff,

v.

Case No.:  
1:17-cv-02768  
Honorable Robert  
M. Dow Jr.

U.S. Department of Homeland Security, et al.

Defendant.

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**NOTIFICATION OF DOCKET ENTRY**

This docket entry was made by the Clerk on Tuesday, November 21, 2017:

MINUTE entry before the Honorable M. David Weisman: Motion hearing held. For the reasons stated on the record, the Court grants Plaintiffs' motion to set production schedule [54]. By the 15th of every month or the closest business day thereto, Defendants shall file a brief status report with the Court regarding the following information from the previous month: (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; and (3) the number of pages processed of the four "priority" record custodians in this case. As of 11/21/17, Defendants shall process 950 pages per month, with the first reporting period ending 12/31/17. Defendants' first status report is due 1/16/18. Plaintiffs agree that the current set of search terms is reasonable for the expedited review of the email accounts of the four prioritized custodians. Plaintiffs confirm that they will not request that Defendants run additional search terms as to these four prioritized custodians absent exceptional circumstances. Status hearing set for 6/20/18 at 9:15 a.m. Mailed notice (ao,)

**ATTENTION:** This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

AMERICAN CIVIL LIBERTIES UNION OF  
GEORGIA, INC., AMERICAN CIVIL  
LIBERTIES UNION OF NORTH CAROLINA,  
INC., AMERICAN CIVIL LIBERTIES UNION  
OF SOUTH CAROLINA, INC., AMERICAN  
CIVIL LIBERTIES OF WEST VIRGINIA, INC.,

Plaintiffs,

v.

U.S. DEPARTMENT OF HOMELAND  
SECURITY and U.S. CUSTOMS AND BORDER  
PROTECTION,

Defendants.

Case No.: 1:17-cv-01309-RWS

**DEFENDANTS' PROPOSED PRODUCTION SCHEDULE**

Defendants U.S. Department of Homeland Security (“DHS”) and U.S. Customs and Border Protection (“CBP”) (collectively, “Defendants”) hereby propose a schedule for the rolling release of documents in this Freedom of Information Act (“FOIA”) case pursuant to the Court’s November 8, 2017 Order. (ECF No. 36).

As detailed by Defendants in the Joint Status Report filed on November 3, 2017 (ECF No. 35), CBP is working diligently to process Plaintiffs' FOIA request, along with the 18 other ACLU affiliate requests, as soon as practicable. CBP has made five releases to the ACLU affiliates of responsive, non-exempt records, totaling over a thousand pages, and has taken substantial steps to ramp up its processing of these requests, including migrating records to a new, more efficient document processing platform; analyzing and 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 potentially responsive 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 requests that, like Plaintiffs', concern Executive Order 13,769, "Protecting the Nation from Terrorist Entry Into the United States," 82 Fed. Reg. 8977 (Jan. 27, 2017). Accordingly, the agency currently estimates that it can process on average 6,500 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 from month-to-month) would contain records collected from custodians in the Atlanta Field Office and corresponding local airports. Notably, due to CBP's efforts to streamline its processes and maximize its available resources for these cases, this current estimated processing rate for the ACLU affiliate cases is nearly double the rate that Defendants' initially presented in the parties' November 3, 2017 Joint Status Report (ECF No. 35) (initially estimating a rate of 3,575).

Given this context, a burdensome production schedule in this case requiring CBP to satisfy an isolated processing threshold for Atlanta Field Office-specific records would disrupt its processing of FOIA requests 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’ request.

For the reasons set forth below, in light of CBP’s expectation that it can process on average 6,500 pages per month across all the ACLU affiliate requests, the Court should permit CBP to process records at such a rate, and 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 request which “(i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed.” 5 U.S.C. § 552(a)(3)(A); *see also id.* § 552(a)(6)(C)(i). If an agency grants a request for 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).<sup>1</sup> The FOIA “does not assign

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<sup>1</sup> As other courts have recognized, FOIA decisions by the U.S. Court of

any particular time frame to release . . . the records sought.” *Landmark Legal Found. v. EPA*, 910 F. Supp. 2d 270, 275 (D.D.C. 2012).<sup>2</sup> 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

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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).

<sup>2</sup> Although *Landmark Legal* and other cases cited herein concern denials of motions for preliminary injunctions, these cases are informative to Plaintiffs’ request for a fixed production schedule. Any demand by Plaintiffs’ 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*, 152 F. Supp. 3d at 6-7 (describing motion for immediate processing of outstanding FOIA requests as “the full relief [the plaintiff] seeks in filing its underlying Complaint”).

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."); *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* ECF No. 1-2. In sum, the request asks CBP to search its Atlanta Field Office and the offices for numerous airports and ports of entry within the Atlanta 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, and including all such

records concerning “[a]ny other judicial order or executive directive issued regarding” the Executive Order. *See* ECF No. 1-2 at 6-8.

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 generally* ECF No. 6-3 at 2-8. 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 generally id.* Fifteen of these requests are now in litigation in thirteen cases filed in thirteen district courts throughout the country. *See generally id.*

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>3</sup> CBP aggregated the requests pursuant to 5 U.S.C. § 552(a)(6)(B)(iv) and 6 C.F.R. § 5.5(d). Accordingly,

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<sup>3</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>.

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. *See* ECF No. 35 at 4-9 (describing in detail the parameters of CBP’s search and collection process).<sup>4</sup> In addition, due to the aggregation of the requests, CBP granted all of the ACLU affiliates’ requests for expedited processing—placing their FOIA requests in the expedited processing queue ahead of all non-expedited requests and later-filed expedited requests—and for fee waivers.

CBP’s search for records from field office custodians collected approximately 103,000 records from 85 custodians in the field offices covered by the aggregated requests. The agency also collected approximately 25,000 email records from custodians within CBP Headquarters, which are potentially responsive to the national ACLU organization’s request and contain records potentially responsive to the ACLU affiliates’ requests. With respect to Plaintiffs’ request in particular, the agency gathered approximately 5,644 potentially responsive email messages and attachments, comprising approximately 17,131 pages.

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<sup>4</sup> Because this Court already has ordered that it “will permit Defendants to proceed with the review and production as they propose,” ECF No. 36 at 2, the details of CBP’s search and collection process are not set forth here.

To date, the agency has made five releases of responsive records to Plaintiffs and the other ACLU affiliates, on July 14, July 26, September 21, October 27, and November 17, 2017. These releases total approximately 1,276 pages, and have substantially completed the agency's response to Parts 2-4 of all of the ACLU affiliates' requests.

## **DISCUSSION**

### **I. THE COURT SHOULD PERMIT THE AGENCY TO PROCESS DOCUMENTS AT A RATE OF 6,500 PAGES PER MONTH ACROSS ALL ACLU FIELD OFFICE REQUESTS**

CBP is working expeditiously both to 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 v. DOS*, No. 14-1777 (BAH), 2015 WL 9907802, at \*11 (D.D.C. Dec. 8, 2015), and will monopolize resources needed to process other ACLU affiliates' requests. Given CBP's estimate that it can process on average 6,500 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 the agency's progress to the Court.

**A. CBP's Current Estimated Average Monthly Processing Rate of 6,500 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 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. As set forth in the accompanying Declaration of Patrick Howard, attached hereto as Exhibit A, a processing rate greater than 6,500 pages per month is impracticable under the current circumstances.

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 to the request and for application of initial, proposed redactions.” *Id.* at 29. A second-level reviewer reviews the proposed responsiveness decision and redactions for consistency and accuracy. *Id.* 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

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, 539-40 (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.

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. ¶ 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 of 21 of these are in litigation in district courts across the country. *Id.* At the same time, the agency has received approximately 94 requests related to the President’s proposed Border Wall, 54 of which are still open and five 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. 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.” ECF No. 1-2 at 6-8. 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.2d (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. 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. The agency anticipates this rate will increase as the review process proceeds 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. However, at this time, given the current circumstances, the agency estimates that it can process 6,500 pages on average per month across all ACLU Field Office requests.

**B. The Court Should Not Enter an Isolated Production Schedule for this Case in Light of Defendants' Current Estimated Processing Rate of 6,500 Pages per Month**

Any order requiring CBP 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 ACLU affiliates, *see* Howard Decl. ¶ 38, 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 6,500 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 based on any changes to the agency's estimated processing rate.

A schedule tied to Atlanta-specific records likely would delay the agency's completion of the processing of all the ACLU affiliates' field office requests. *See id.* ¶ 38. 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 id.* ¶¶ 35, 38. 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. 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.* Not only would this expedite the ultimate release of responsive records to all ACLU affiliates, it would better ensure consistent and appropriate 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 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 as efficiently as possible.

Moreover, given the finite nature of CBP's FOIA capabilities, a schedule tied to Atlanta-specific records would 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 already was granted expedited treatment, which moved it ahead of all non-expedited FOIA requests. Howard Decl.

¶ 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 Executive Order 13,769—from which agency resources would be diverted and which are no less important or time-sensitive than Plaintiffs'. *See, e.g., Daily Caller*, 2015 WL 9907802, at \*11 (“[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) (recognizing that 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) (concluding that ordering agency to prioritize particular plaintiff’s request

would have effect of “‘vault[ing]’ 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, an isolated schedule for Atlanta-specific records could exhaust the agency’s processing capabilities for the ACLU affiliate requests. In recent weeks, the agency has received production orders in four of the parallel actions, which combined require the agency to process approximately 8,740 pages for those cases in the next two months alone. *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 the following two months, and remaining approximately 4,100 pages in third month); Order, *ACLU of Michigan v. DHS*, No. 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); Order, *ACLU of San Diego v. DHS*, No. 3:17-cv-00733 (S.D. Cal. Nov. 6, 2017) (ECF No. 53) (ordering processing of 1,000 pages per month until complete); Order, *ACLU of Oregon v. DHS*, 3:17-cv-00575 (D. Or. Nov. 13, 2017) (ECF No. 31) (ordering production of all responsive documents, which exceed 5,200 pages, by May 31, 2018). Another similarly 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.

### **CONCLUSION**

For the foregoing reasons, this Court should enter an order: (1) permitting CBP to continue to process Plaintiffs' request along with the other ACLU affiliates' request at an average monthly rate of 6,500 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 based on any changes to the agency's estimated processing rate.

Dated: November 21, 2017

Respectfully submitted,

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### **CERTIFICATE OF COMPLIANCE**

I hereby certify that the documents to which this certificate is attached have been prepared with one of the font and point selections approved by the Court in Local Rule 5.1B for documents prepared by computer.

/s/ Emily B. Nestler  
EMILY B. NESTLER

### **CERTIFICATE OF SERVICE**

I hereby certify that on November 21, 2017, I electronically filed a copy of the foregoing. Notice of this filing will be sent via email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ Emily B. Nestler  
EMILY B. NESTLER

# Exhibit A

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

American Civil Liberties Union of  
Georgia, Inc., et al.,

Plaintiffs,

v.

U.S. Department of Homeland  
Security and United States Customs  
and Border Protection,

Defendants.

Case No. 1:17-CV-01309-RWS

Hon. Richard W. Story  
United States District Court Judge

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, 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 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. I submit this declaration pursuant to the Court's November 8, 2017 Order, ECF No. 36.

5. 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

6. 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).

7. 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.

8. 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 four Branch Chiefs who, in turn, report to the Privacy and Diversity Office. None of these employees is an attorney.

9. 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.

10. 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.

11. 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.

12. 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.

13. 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.

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

15. 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.

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

20. As of November 15, 2017, CBP is subject to four 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 has been 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. The first 820 pages must be processed and released 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.

21. 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.

22. 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.

23. 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 documents so far and there are still more documents to process.

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

24. 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.

25. 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.

26. 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.

27. 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.

28. 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.

29. 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.

30. 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.

31. 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.

32. 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.

33. 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.

34. 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.

35. 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.

36. CBP currently estimates that it will be able to process approximately 6,500 pages per month across all of the records collected as potentially responsive to the ACLU affiliates' requests. 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 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 fall below the approximately 6,500 pages per month figure. 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 expeditiously 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. As a result, the agency anticipates that its current estimated processing rate for records potentially responsive to the ACLU affiliate FOIA requests regarding Executive Order 13,769 will increase over time.

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 us to increase our processing rate for documents identified as potentially responsive to Plaintiffs' request.

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* [foiaar.cbp.gov](http://foiaar.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 foregoing is true and correct to the best of my knowledge.

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

Not at Hand

Patrick A. Howard