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December 22, 2017

The Honorable John H. Rich
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,

The Plaintiffs respectfully submit this response to the government's letter brief. Notably, the government recently notified the Plaintiffs that it plans to adjust its position as a result of numerous scheduling orders in separate cases. *See, e.g.*, C.D. Cal. Order, Attached as Exh. 1; N.D. Ga. Order, Attached as Exh. 2. The Plaintiffs agree that the recent orders undermine the government's position. In light of these developments and for the reasons set forth below, the Court should reject the government's position and order case-specific processing with a date certain for completing production.

I. Case-Specific Versus Nationwide Order

The government argues against a case-specific order. There are three primary problems with its position. First, the government fails to acknowledge that a case-specific order is necessary to ensure prompt processing. Although the government argues against a case-specific order, it offers no authority for an order with nationwide scope—and there is no such authority. Pls. Br. at 2-5. In essence, the government asks the Court to issue no order at all, or to completely defer to the government's discretion. *See, e.g.*, Gov. Br. at 3 (arguing against "[a] specific production schedule here"). Neither option is consistent with the Freedom of Information Act ("FOIA") statute's requirement for "prompt" processing, 5 U.S.C. § 552(a)(3)(A), which is enforceable by courts. *Id.* § 552(a)(4)(B). The Court can (and should) issue an order requiring pre-trial production for the specific FOIA request underlying this litigation. *See, e.g.*, Fed. R. Civ. P. 16(b); Local R. 16.2; *see also* Pls.

Br. at Exhs. 1-4, ECF Nos. 36-1, 36-2, 36-3, 36-4 (orders from Michigan, Washington, Illinois, and Southern California).[1] The courts' recent orders in Georgia and California confirm that case-specific orders are the preferred method to ensure prompt processing. *See* C.D. Cal. Order, Exh. 1; N.D. Ga. Order, Exh. 2.

Relatedly, the government confuses the applicable burdens, suggesting that case-specific scheduling orders are appropriate only where the plaintiff can prove "exceptional circumstances" or "harm." Gov. Br. at 4 (citing, *e.g.*, *The Nation Magazine v. Dep't of State*, 805 F. Supp. 68, 74 (D.D.C. 1992); *Elec. Privacy Info. Center (EPIC) v. Dep't of J.*, 15 F. Supp. 3d 32, 44-47 (D.D.C. 2014)). That is also wrong. Both cases cited for that proposition, *The Nation Magazine* and *EPIC*, involved motions for preliminary injunctive relief and the accompanying burden on the party seeking such extraordinary relief. 805 F. Supp. at 74; 15 F. Supp. 3d 32, 44-47. This case, by contrast, seeks to impose a run-of-the-mill scheduling order, similar to those imposed in other cases. Howard Decl. ¶ 19, ECF No. 35-1; *see also* C.D. Cal. Order, Exh. 1; N.D. Ga. Order, Exh. 2. And in any event, the government, not the Plaintiffs, bears the burden in FOIA cases. 5 U.S.C. § 552(a)(4)(B).[2]

Second, the government confuses the "aggregation" doctrine of FOIA law. It states that it may aggregate numerous requests "for purposes of processing." Gov. Br. at 2-3 (citing 5 U.S.C. § 552(a)(6)(B)(iv); 6 C.F.R. § 5.5(d)). Yet "aggregation" relates to preliminary procedures to exhaust administrative remedies. Specifically, the government can "aggregate" FOIA requests to show "unusual circumstances" to extend the typical 20-day deadline to respond. 5 U.S.C. § 552(a)(6)(B)(iv); 6 C.F.R. § 5.5(d). But aggregation does not authorize a court to order nationwide processing during litigation. Otherwise, there would have been no need to consolidate the cases in multi-district litigation—which the government sought and lost. MDL Order,

[1] There is no dispute that the Court has authority to require case-specific production. *See, e.g.*, *Payne Enters., Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988).

[2] The government's argument regarding harm is also inconsistent with its grant of expedited processing, Gov. Decl. ¶ 51, because expedited processing is granted when the requester has demonstrated "a compelling need" or other standards. 5 U.S.C. § 552(6)(E)(i); 6 C.F.R. § 5.5(e); *see also Elec. Privacy Info. Ctr. v. Dep't of J.*, 416 F. Supp. 2d 30, 41 (D.D.C. 2006).

ECF No. 21 (Aug. 2, 2017).

Third, the government makes a conclusory argument that a case-specific order would be inefficient and undermine consistent processing. Gov. Br. at 3-4. But that argument relates to the appropriate processing *rate*. It does not support a nationwide scheduling order (which the Court lacks authority to enforce), nor does it support issuing no scheduling order at all. *See* Pls. Br. at 2-5; *Seavey v. Dep't of J.*, No. CV 15-1303, 2017 WL 3112816, at *4–5 (D.D.C. July 20, 2017) (rejecting similar arguments by the government). The government also argues that separate processing could undermine "consistent and accurate treatment of exempt information." Gov. Br. at 4 (citing *Daily Caller v. U.S. Dep't of State*, 152 F. Supp. 3d 1, 15 (D.D.C. 2015)). But the cited authority involved a motion for preliminary injunction seeking to force the government to produce records *within 20 days*. *Daily Caller*, 152 F. Supp. 3d at 3. That is far different than the Plaintiffs' request, which seeks a multi-month production schedule for a request pending for almost one year.

In any event, even assuming that case-specific processing is marginally less efficient than nationwide processing, any inefficiency results from the MDL panel's denial of the government's motion to consolidate. MDL Order, ECF No. 21. As explained by the MDL panel, pretrial proceedings are not extensive in any of these FOIA cases. *Id.* Because each case progresses independently in separate districts, a case-specific order is appropriate.

II. Processing Rate

The government should be able to process the modest quantity of responsive records by mid-January or, at the very least, at a rate of 820 pages per month with a hard deadline of November 2, 2018. Yet the government asks the Court to allow it to process Plaintiffs' request "as swiftly as practicable"—which would amount to no scheduling order at all. Gov. Br. at 6. There are numerous flaws with these arguments.

First, the government maintains that potentially responsive documents contain privileged information, privacy information, and information compiled for law enforcement purposes. Gov. Br. at 5-6. But the same factors are true in other

cases where courts have ordered even higher processing rates. Howard Decl. ¶ 19, ECF No. 35-1 (citing cases requiring 1,000 pages per month); *see also* C.D. Cal. Order, Exh. 1 (ordering a hard deadline of February 28, 2018); N.D. Ga. Order, Exh. 2 (ordering 1,000 pages per month with hard deadline of June 17, 2018). The government also contends that processing documents for discovery differs from processing documents for FOIA. Gov. Br. at 6. The Plaintiffs' requested rate, however, already takes into account any differences between discovery and FOIA. As described, Maine attorneys can process 9,000 documents per week, totaling approximately 36,000 documents per month—a rate that is factors higher than the Plaintiffs' suggested FOIA-processing rate of 820 pages per month.

The government also argues that its obligations in this case should be balanced against its obligations in separate FOIA cases. By statute, however, the routine business of processing FOIA requests is generally no excuse to delay the statutory "promptness" requirement. 5 U.S.C. §§ 552(a)(3)(A), (a)(6)(C)(ii) (unless the government "demonstrates reasonable progress," which it has not shown here). That makes sense because the agency possesses the authority to remedy personnel or resource shortages causing backlogs in routine processing. *Id.* § 552(j)(2). For instance, the agency's Chief FOIA Officer has authority to "recommend to the head of the agency such adjustments to agency practices, policies, personnel, and funding as may be necessary to improve its implementation of [the FOIA.]" *Id.* To the extent that there was an increase in FOIA filings in the past year, it may be reasonable to take that increase into account when determining the appropriate rate.[3] But a rate of 820 pages per month is sufficiently gentle even under that standard.

Finally, the government's position is particularly unpersuasive because, until now, it proffered no case-specific processing rate at all. The Plaintiffs, by contrast, have been consistent in proposing a reasonable, case-specific processing rate that is even slower than the rate already ordered by other courts in similar cases. Contrary to the government's argument, a rate of at least 820 pages per month is the very least the government can do to ensure the FOIA request is processed promptly.

[3] Backlogs from two years ago should have been remedied by now.

Very truly yours,

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, et al.

Plaintiffs,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, et al.,

Defendants.

Case No. 2:17-cv-2778-RHW

ORDER SETTING PRODUCTION SCHEDULE

On November 13, 2017, the parties filed a Joint Status Report. ECF No. 42. A status conference occurred before this Court on December 1, 2017. ECF No. 49. At that time, the Court found there was insufficient factual evidence before it to determine the production capacity of Defendants and requested supplemental briefing. *Id.* In particular, the Court requested factual affidavits to address the production capability of the approximately 9,000 pages of documents identified to be specific to the Los Angeles Field Office. Both parties filed supplemental briefing (ECF Nos. 52, 53), and the Court heard argument on the matter on December 11, 2017. ECF No. 57.

Defendants provided a Declaration from Patrick A. Howard, Branch Chief within the Freedom of Information Act ("FOIA") Division of the United States

Customs and Border Protection ("CBP") of the United States Department of Homeland Security. ECF No. 52-1. Mr. Howard verified that CBP has identified approximately 3,000 documents totaling approximately 9,200 pages as potentially responsive to Plaintiffs' request. *Id.* at ¶ 5. 1,400 of these pages have been processed, *id.*, and Defendants noted at argument that only approximately 300 of those 1,400 were provided to Plaintiffs, either due to being non-responsive or protected by a FOIA exemption.

Plaintiffs initially requested that the Court issue an order requiring production of the remaining approximately 7,800 pages by December 22, 2017. Mr. Howard's Declaration and argument by Defendants both asserted that this would be impossible. Mr. Howard explained that FOIA requests of this nature require multiple levels of review, as well as possible consultation with outside agencies. ECF No. 52-1 at ¶¶ 33-36. Currently, CBP estimates that it can process 6,500 pages per month on average across all affiliates. *Id.* at ¶ 40.

Contrary to the Court's request, Defendants did not provide, either in argument or in Mr. Howard's Declaration, an estimate of how many pages could be processed monthly that are specifically responsive to Plaintiffs' request in this district. Rather, Mr. Howard asserted that based on the nature of the request and limitations of resources, CBP could not achieve a faster national monthly processing rate. *Id.* at ¶ 41. Nothing in the supplemental briefing provided by Defendants provided the Court with a factual basis on which to determine the output capability for this specific request.

Five other courts have issued production orders for requests in similar FOIA cases. *See ACLU of San Diego and Imperial Counties v. U.S. Dept. of Homeland Security, et al.*, 17-cv-0733-L-JLB; *ACLU of Michigan v. U.S. Dept. of Homeland Security and U.S. Customs and Border Protection*, 17-cv-11149-JEL-EAS; *ACLU of Washington, et al. v. U.S. Dept. of Homeland Security, et al.*, 17-cv-00562-MJP; *ACLU of Oregon, et al. v. U.S. Dept. of Homeland Security, et al.*, 17-cv-00575-

HZ; *ACLU of Illinois et al. v. U.S. Dept. of Homeland Security, et al.*, 17-cv-02768. These orders each generally require production of roughly 800 to 1000 pages per month, although the Western District of Washington requires a larger production in the third month (*see ACLU of Washington, et al. v. U.S. Dept. of Homeland Security, et al.*, 17-cv-00562-MJP), and the District of Oregon has set a time deadline rather than a monthly production requirement (*see ACLU of Oregon, et al. v. U.S. Dept. of Homeland Security, et al.*, 17-cv-00575-HZ).

Defendants argue that they do not believe a production order is appropriate, but if they Court intends to issue one, they request it be 800 to 1,000 pages, similar to the output in five other court orders. Plaintiffs respond that production averaging 2,000-3,000 pages would be more appropriate, particularly given the length of time that has elapsed since their request. The request was sent on February 2, 2017. ECF No. 42 at 2.

The Court has reviewed the record in each of these cases and cannot determine the reasoning behind the number or the timeline on which it arrived. The Court seeks to avoid an arbitrary production order. In calculating the following production schedule, the Court has taken in account numerous factors and seeks to reach a balance between the public interest need in Plaintiffs' request and statements made by Defendants regarding the government's production abilities.

The Court notes that Defendants stated in argument that they would not oppose a production schedule of 1,000 pages per month. In the month of January, however, this would exceed their alleged 6,500 page maximum production capacity. The Court reaches this conclusion by adding 1,000 pages to the following: 820 pages in the Eastern District of Michigan, 867 pages in the District of Oregon,[1] 950 pages in the Northern District of Illinois, 1,000 pages in the Southern District of California, and 2,700 pages in the Western District of

[1] The court order in the District of Oregon does not require an exact monthly production, however, it does require all production by May 31, 2018. The Court arrived at 867 as an average number for production by this date.

Washington, the bulk remaining after two months of 1,000-page monthly production. This total is 6,337. If Defendants can produce 1,000 pages in this district monthly as presented to the Court in argument, this means the government has a higher capacity than 6,500 pages by 837. Thus, the Court finds it reasonable to conclude that the total monthly capability for production is 7,337 pages per month at this time, but based on representations by Defendant will increase by January.

The Court next calculated the total required production across the five existing court orders and subtracted these figures from 7,337 for each month. The Court arrives at the following production numbers: (1) December: 4,637 pages across all orders, resulting in a remaining capacity of 2,700 pages[2]; (2) January: 6,337 pages across all orders, resulting in a remaining capacity of 1,000 pages; and (3) February: 3,637 pages across all orders, with production in the instant case of all remaining documents that have not been turned over. The Court notes that the February output will be higher than the projected monthly capacity; however, Defendants represented to the Court that the government is actively increasing its production capacity, and the Court finds it reasonable to expect these enhanced procedures should be in place by February. Further, February 2018 will be one full year since Plaintiffs' requests. The Court finds this timeline of roughly 90 days since the December 1, 2017, status conference to be in the interest of justice.

Accordingly, IT IS HEREBY ORDERED:

1. By **January 2, 2018**, Defendants shall have reviewed for responsiveness and exemption under FOIA and then produced to Plaintiffs the first **2,700 pages** of documents identified as potentially responsive to Plaintiff's

[2] The Court notes that this order is being issued on December 12, 2017; however, the parties were put on notice at the December 1, 2017, status conference that the Court was inclined to issue a full production order by December 22, 2017, and thus Defendants should have been preparing accordingly.

FOIA request, based on searches of records of the custodians in the CBP Los Angeles Field Office.

2. By no later than **January 31, 2018**, Defendants shall have reviewed for responsiveness and exemption under FOIA and then produced to Plaintiffs the next **1,000 pages** of documents identified as potentially responsive to Plaintiff's FOIA request, based on searches of records of the custodians in the CBP Los Angeles Field Office.
3. By no later than **February 28, 2018**, Defendants shall have reviewed for responsiveness and exemption under FOIA and then produced to Plaintiffs **all remaining** documents identified as potentially responsive to Plaintiff's FOIA request, based on searches of records of the custodians in the CBP Los Angeles Field Office.
4. By **March 14, 2018**, the parties shall submit a joint status report and proposed case schedule to the Court, including but not limited to the status of the case and a proposed briefing scheduled for motions.

IT IS SO ORDERED. The District Court Executive is directed to enter this Order and forward copies to counsel.

DATED this 12th day of December, 2017.

s/Robert H. Whaley
ROBERT H. WHALEY
Senior United States District Judge

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

AMERICAN CIVIL LIBERTIES UNION OF GEORGIA, INC., AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA, INC., AMERICAN CIVIL LIBERTIES UNION OF SOUTH CAROLINA, INC., and AMERICAN CIVIL LIBERTIES UNION OF WEST VIRGINIA, INC.,	:	CIVIL ACTION NO. 1:17-CV-1309-RWS
Plaintiffs,	:	
v.	:	
U.S. DEPARTMENT OF HOMELAND SECURITY and U.S. CUSTOMS AND BORDER PROTECTION,	:	
Defendants.	:	

ORDER

This case comes before the Court on Defendants' Proposed Production Schedule [37] and Plaintiffs' Response in Opposition [38]. After reviewing the record and considering the parties' arguments in their briefs, the Court enters the following Order.

Background

On February 2, 2017, Plaintiffs sent Defendants a Freedom of Information Act ("FOIA") request, seeking records concerning local implementation of President Trump's January 27, 2017 Executive Order titled "Protecting the Nation From Foreign Terrorists Entry Into the United States" and any related judicial or executive order. (Compl., Dkt. [1] ¶¶ 1–2.) On April 12, 2017, Plaintiffs filed this action alleging that Defendants violated FOIA by (1) failing to timely determine whether they would comply with Plaintiffs' request; (2) failing to make the requested records available; and (3) failing to timely determine whether they would expedite the processing of Plaintiffs' request.

On June 30, 2017, pursuant to the Court's Order [23], this action was stayed pending a decision from the Judicial Panel on Multidistrict Litigation ("JPLM") as to whether this case would be consolidated with twelve other related cases. On August 2, 2017, the JPML issued an order denying transfer of this action (see Dkt. [25]), and the Court lifted its stay shortly thereafter (see Dkt. [26]).

On November 3, 2017, the Parties filed a Joint Status Report [35] in

which Defendants described their process of obtaining, reviewing, and producing documents responsive to Plaintiff's request. The Court permitted Defendants to continue with this process, but deemed it appropriate to established a timetable for production. (See Dkt. [36].)

Pursuant to the Court's Order, Defendants submitted the Proposed Production Schedule [37] currently before the Court. In it, Defendants stress the time- and resource-intensive nature of processing Plaintiffs' request, especially in the context of seventeen similar requests filed by the American Civil Liberties Union ("ACLU") and its affiliates, which Defendants have consolidated to identify records responsive to all of the requests and avoid duplicating efforts. Through this process, Defendants have identified approximately 275,000 pages spanning 103,000 records and 25,000 emails that are potentially responsive to the ACLU requests. Of those, approximately 17,131 pages are responsive to Plaintiffs' request, in particular.

To date, Defendants have released approximately 1,276 pages of responsive records, total–that is, to Plaintiffs and the other ACLU affiliates. Moving forward, Defendants estimate that they can process and produce approximately 6,500 pages per month, total, some of which, presumably, will

be responsive to Plaintiffs' request. Defendants now ask the Court to enter an order permitting them to produce documents at a rate commensurate with those projections.

In their response [38], Plaintiffs assert that they "and the public have an urgent need for the records at issue so that its members, media organizations, community groups, and ordinary citizens can have the information necessary to participate in the ongoing debate over the Orders at a time when they can still influence public policy." (Resp. [38] at 11.) They note that "]c]ourts consistently require expedited disclosure in cases like this one that involve requests for documents about matters that are subjects of intense media scrutiny and ongoing public debate." (Id. at 10.) They request that the Court set February 2, 2018, as the date by which all documents must be produced.

Discussion

FOIA requires a federal agency, upon a request for records that reasonably describes documents held by that agency, to make those documents promptly available to any person unless the information within the records is protected from disclosure by a statutory exemption. See 5 U.S.C. § 552(a)(3), (b); see also Allen v. EEOC, 366 F. App'x 972, 973 (11th Cir. 2010). After

suit is filed against the agency, "[t]he Court then has the authority to oversee and supervise the agency's progress in responding to the request. Seavey v. Dep't of Justice, No. CV 15-1303, 2017 WL 3112816, at *2 (D.D.C. July 20, 2017). Exactly how much time is required to respond to a FOIA request is context dependent; however, at least one court of appeals has indicated that it should "typically be within days or a few weeks of" the agency's initial determination, "not months or years." Id. (quoting Citizens for Responsibility & Ethics in Wash. v. Fed. Election Comm'n, 711 F.3d 180 (D.C. Cir. 2013)) (internal quotations omitted).

Here, Plaintiff's request was made on February 2, 2017. Since then, Defendants have identified 17,131 pages of potentially responsive documents. Yet–rapidly approaching the one-year anniversary of Plaintiff's request–Defendants have produced only 1,276 pages across all eighteen ACLU requests. Even assuming Defendants quintuple that total and continue at the requested rate, there is still no guarantee that Plaintiffs' request will be completed in a timely fashion. The Court, therefore, finds Defendants' Proposed Production Schedule [37] inadequate. Instead, the Court **ORDERS** the following:

1. By no later than **January 16, 2018**, Defendants shall process no less than 1,000 pages of the records identified as potentially responsive to Plaintiffs' FOIA request and (i) produce to Plaintiff all responsive, non-exempt records identified in this review and (ii) identify any asserted exemptions.

2. **Each month thereafter**, Defendants shall repeat this process, processing no less than 1,000 pages of the records identified as potentially responsive to Plaintiffs' FOIA request and, by the 16th of each month, (i) produce to Plaintiff all responsive, non-exempt records identified in this review and (ii) identify any asserted exemptions.

3. By no later than **June 17, 2018**, Defendants shall have fully responded to Plaintiff's request, having reviewed all records identified as potentially responsive to Plaintiffs' FOIA request and (i) produced to Plaintiff all responsive, non-exempt records identified and (ii) identified any asserted exemptions.

4. By **June 17, 2018**, the Parties shall submit a joint status report and proposed case schedule to the Court, addressing: (i) the status of Defendants' response to Plaintiffs' FOIA request; and (ii) a proposed briefing schedule for dispositive motions, if appropriate.

SO ORDERED, this 13th day of December, 2017.

RICHARD W. STORY
United States District Judge