IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW, Plaintiff, vs. UNITED STATES DEPARTMENT OF STATE, Defendant.	Case No. 17 Civ. 7520 (PGG)

PLAINTIFF'S REPLY MEMORANDUM OF LAW
IN FURTHER SUPPORT OF PLAINTIFF'S MOTION
TO EXPEDITE FREEDOM OF INFORMATION ACT ("FOIA") ACTION

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INTRODUCTION

Defendant's opposition is notable for what it does not contest. Most notably, Defendant does not disagree that FOIA matters are especially appropriate for expedition (*see* Pl.'s Mem. of Law in Supp. of Mot. to Expedite FOIA Action ("Mem."), at 4-6), that there is intense public interest in the subject matter of this litigation and that the public is entitled to test the government's reliance on the requested reports by timely obtaining them (*see id.* at 7-8), and that the Court should set a schedule for processing and producing non-exempt portions of the responsive records (*compare id.* at 9 *with* Def.'s Mem. of Law in Opp'n to Pl.'s Mot. to Expedite ("Opp'n") at 1). The opposition also reveals that only six documents are at issue. *See* Decl. of E. Stein ¶ 9. Those documents have been at the heart of the controversy over the President's most recent iteration of his efforts to ban entry of Muslims to this country, *see* Mem. at 2. Defendant does not make and cannot make a claim of burden: this case does not involve an overwhelming number of documents or documents that are difficult to locate.

Accordingly, the dispute boils down to (a) the production schedule that the Court should impose and (b) whether the Court should order Defendant to produce, before summary judgment briefing, written justifications for portions of responsive records that are withheld.

Because Plaintiff's proposed schedule for production and indexing is appropriate in the "factual context" presented here, 28 U.S.C. § 1657(a), the Court should grant Plaintiff's motion and order Defendant to produce the six documents (or all segregable non-exempt portions thereof) within 21 days and written justification for any withheld documents or portions of documents within 28 days.

ARGUMENT

I. Defendant's Steadfast Refusal To Propose A Viable Production Schedule Is Unreasonable.

Defendant's opposition is a continuation of its strategy of obfuscation and delay. *See* Decl. of J. Martínez Resly ¶¶ 3-15 (detailing history of Defendant's refusal to provide schedule). Indeed, Defendant argues that the Court "should decline to adopt [P]laintiff's proposed 21-day processing and production schedule[] [because] [e]xpedited requests are only required to be processed 'as soon as practicable,'" Opp'n at 2, but never explains what would be "practicable" by proposing an expedited and workable production schedule.

Moreover, Defendant has failed to invoke the mechanisms afforded by the FOIA to extend the time for agencies to respond to requests. Specifically, the "FOIA requires that 'each agency, upon request for records . . . determine within 20 [business] days . . . whether to comply with such request." *Nat'l Day Laborer Org. Network v. U.S. Immig. & Customs Enf't*, 236 F. Supp. 3d 810, 814 (S.D.N.Y. 2017). At that time, the agency "must at least indicate . . . the scope of the documents it will produce and the exemptions it will claim with respect to any withheld documents." *Citizens for Responsibility & Ethics in Wash. v. FEC*, 711 F.3d 180, 182-83 (D.C. Cir. 2013). And it may extend that 20-day deadline by 10 business days if, within those 20 days and in writing, it "set[s] forth the unusual circumstances for such extension and the date on which a determination [of the request] is expected to be dispatched." 5 U.S.C. § 552(a)(6)(B)(i). Defendant never made a timely claim of "unusual circumstances" with respect to Plaintiff's FOIA request.

Nor did Defendant request a stay of litigation on the basis of "exceptional circumstances," as permitted once the original 20-day period has passed. *Bloomberg, L.P. v. FDA*, 500 F. Supp. 2d 371, 374 (S.D.N.Y. 2007). "Exceptional circumstances" are shown where

"(1) the agency is deluged with a[] volume of requests for information on a level unanticipated by Congress; (2) existing agency resources are inadequate to deal with the volume of requests within the time limits established [by the FOIA]; and (3) [] the agency can show that it is exercising due diligence in processing the requests." *Id.* (citing *Open Am. v. Watergate Spec. Prosecution Force*, 547 F.2d 605, 616 (D.C. Cir. 1976)). Defendant made no attempt to request a stay on the basis of such exceptional circumstances.

It only gets worse. Instead of invoking its statutory rights and making the requisite showings, Defendant asserts that the Court should provide it an unspecified amount of additional time to process and produce non-exempt portions of *six documents*. *See* Decl. of E. Stein ¶ 9. And that is even though, under Plaintiff's proposed schedule, the FOIA request will have been pending for almost six months.

More broadly, Defendant has failed to honor its obligation to respond with due diligence and the appropriate level of attention to an admittedly urgent request. Although Defendant initially provided "an estimated completion date of October 31, 2017" for Plaintiff's full request, *id.* ¶ 6, it failed to notify Plaintiff that it would not meet that estimated projection once that became clear, did not initiate contact with Plaintiff once that timeframe had passed, and still has not provided Plaintiff an estimated completion date for processing and producing the six responsive documents, *see* Decl. of J. Martínez Resly ¶¶ 2, 13, 15.[1] Moreover, although it should have been clear to Defendant by at least early October, when Defendant's counsel was

[1] Defendant's reference to its "FOIA [c]aseload" for the fiscal years *preceding* the year in which Plaintiff made its request, *see* Decl. of E. Stein ¶ 13 (request and backlog metrics for FY 2011 to FY 2016, not FY 2017), is clearly irrelevant, and Defendant's professed ability to reduce its backlog by more than 11,000 requests in a one-year period, *see id.* ¶¶ 13-14, means little if it cannot process six responsive documents in six months.

served with the Complaint, that the portion of Plaintiff's request at issue in this litigation was the most urgent,[2] *see* Dkt. 1, Plaintiff had to move to expedite this action to receive any sign of progress on even this narrow portion of the request, *see* Ex. 1 to Decl. of E. Stein (letter from Defendant dated Dec. 5, 2017, five days after Plaintiff served motion). Nor has Defendant explained why it has taken so long to "retriev[e]" (Decl. of E. Stein ¶ 9) the two reports to the President that are the backbone of the government's effort to distinguish the current version of the Muslim travel ban from its two ill-fated predecessors. *See Int'l Refugee Assistance Proj. v. Trump ("IRAP IV")*, — F. Supp. 3d —, 2017 WL 4674314, at *32 (D. Md. Oct. 17, 2017), *appeal docketed* No. 17-2231 (4th Cir. Oct. 23, 2017). Defendant clearly knew where to find these documents.

The vague statements in Defendant's declaration in support of its opposition do not demonstrate that Defendant is taking appropriate measures to ensure that processing and production will occur expeditiously. For example, although it claims that "the White House and multiple other government agencies" will need to "be consulted," the only apparent step it has taken has been to refer the documents to the Department of Homeland Security ("DHS"). Decl. of E. Stein ¶¶ 9, 12. There is no indication that the consultation procedure with other agencies has commenced and no hint as to how long consultation will take or whether it will take place concurrently or sequentially, one agency at a time. *See id.* ¶ 9. Rather than moving this suit to resolution, Defendant's opposition lays the groundwork for further delays if this Court does not act to set an expedited schedule.

[2] For this reason, Defendant's stray references to the "br[eadth]" and "complex[ity]" of the request or the fact that "[P]laintiff has not withdrawn" the portions not at-issue in this litigation are irrelevant. Opp'n at 3.

It also bears emphasis that if Defendant were serious about demonstrating diligence, it presumably would have obtained a declaration from DHS or explained in its own declaration how it otherwise intends to facilitate expedition of the records at issue.[3]

Nor can Defendant excuse its conduct by asserting that "[b]ecause processing and . . . production of the records will fall to DHS, the Court cannot order the State Department to take any further action." Opp'n at 3. As an initial matter, Defendant at once attempts to wash its hands of the matter, *see id.*, but also asserts that it "possess[es] equities in [the] material" such that "exemption[]" determinations "will require inter-agency coordination," *id.* at 4. Second, and more fundamentally, it is well settled that the referring agency — here, Defendant — "is ultimately responsible for processing responsive records [that were] in its custody and control at the time of the FOIA request." *Plunkett v. DOJ*, 924 F. Supp. 2d 289, 305 (D.D.C. 2013).[4] Moreover, the official guidance on referrals, consultations, and coordination instructs that referral and consultation procedures "are designed to maximize efficiency and ensure agency

[3] *Cf., e.g.*, *Hall v. CIA*, 881 F. Supp. 2d 38, 56 (D.D.C. 2012) (CIA "fulfilled its burden as to the coordination of these documents" where it submitted "supporting declarations from the coordinating agencies"); *Keys v. Dep't of Homeland Sec.*, 570 F. Supp. 2d 59 (D.D.C. 2008) (declarations submitted from agencies to which documents referred). Again, there is no indication from DHS that it is actually processing the six responsive documents. Notably, although it is "[s]tandard [p]rocedure[]" upon receipt of a referral to send the FOIA requester an acknowledgment of receipt that includes both agencies' tracking numbers, *OIP Guidance — Referrals, Consultations, and Coordination: Procedures for Processing Records When Another Agency or Entity Has an Interest in Them*, DOJ (2011), https://www.justice.gov/oip/blog/foia-guidance-13, Plaintiff has received no such communication from DHS.

[4] *See also Gahagan v. U.S. Citizenship & Migration Servs.*, 2015 WL 350356, at *19-20 (E.D. La. Jan. 23, 2015) ("In providing, at § 552[(a)](3)(A), that 'each agency, upon any request for records . . . shall make the records promptly available to any person,' FOIA imposes a duty upon the agency that receives the request, not upon a third-party agency that receives the request upon referral. . . . [N]o provision of the statute establishes that an agency may avoid responsibility for improper withholding by referring documents elsewhere."); *Hall*, 881 F. Supp. 2d at 56 ("The CIA goes on to state that it 'has fulfilled its obligation and has no power or control over the actions of another federal agency.' Here, the CIA's response is not only baffling, but the failure to produce the documents amounts to an improper withholding.").

accountability for the overall benefit of FOIA administration." *OIP Guidance*, *supra* note 3. Indeed, Defendant's declarant appears to understand the State Department's responsibility for the inter-agency coordination where he states that the "Department is working to process Plaintiff's request expeditiously" *after* the Department has referred the documents to DHS. Decl. of E. Stein ¶ 12. Thus, the Court can, and should, impose a production deadline on Defendant, which has "the ultimate responsibility for a full response" to the FOIA request. *Hronek v. DEA*, 16 F. Supp. 2d 1260, 1272 (D. Or. 1998), *aff'd*, 7 F. App'x 591 (9th Cir. 2001).[5]

In this regard, the Court should not "give the agency unchecked power to drag its feet and 'pay lip service' to [Plaintiff's] 'statutory and regulatory entitlement to expedition.'" *Elec. Priv. Info. Ctr. v. DOJ*, 416 F. Supp. 2d 30, 37 (D.D.C. 2006). Defendant has demonstrated that it has the ability to act quickly when a deadline is imposed upon it — here, to demonstrate progress, Defendant "retriev[ed]" the responsive documents before its deadline to oppose Plaintiff's motion to expedite. *See also* Decl. of E. Stein ¶¶ 9-10 ("Only court-ordered deadlines in FOIA litigation cases take precedence over expedited FOIA cases.").

As outlined in the Complaint, the public's need for the requested reports is intense and urgent. *See* Dkt. 1 ¶¶ 36-50; *see also* Mem. at 6-8. This urgency has only grown now that the travel ban is in full effect following the Supreme Court's stay of the preliminary injunctions entered by two different district courts — categorically barring entry of approximately 150

[5] *See In re Wade*, 969 F.2d 241, 247-48 (7th Cir. 1992) ("All records in an agency's possession, whether created by the agency itself or by other bodies covered by the [FOIA], constitute 'agency records.' The United States Attorney is obligated to produce nonexempted documents pursuant to the Act. The agency cannot avoid the request or withhold the documents by referring them[.]" (citation omitted)); *Grove v. DOJ*, 802 F. Supp. 506, 518 (D.D.C. 1992) ("The FBI may refer documents to their originating agencies and enlist the agencies' assistance in making a release determination. However, the FBI cannot avoid its own obligation to respond to the FOIA request with respect to these forwarded documents. The FBI must therefore provide the supplemental declaration and either assert applicable exemptions or release the forwarded documents." (citation omitted)).

million people from six predominantly Muslim countries, including those with family members, other loved ones, and business or academic colleagues in this country. *See Trump v. Int'l Refugee Assistance Proj.*, — S. Ct. —, 2017 WL 5987435 (Dec. 4. 2017); *Trump v. Hawaii*, — S. Ct. —, 2017 WL 5987406 (Dec. 4, 2017); *IRAP IV*, 2017 WL 4674314. Expedition is in the interest of justice and is consistent with the purposes of the FOIA. *See* Mem. at 4-6, 8-9.

II. Defendant Is Not Entitled To Delay Written Justifications For Non-Disclosed Records Or Portions Of Those Records.

Defendant is also incorrect that Plaintiff's request for a *Vaughn* index is premature. *See* Opp'n at 4-5. Although Defendant cites to cases where courts have held otherwise, *id.* at 5, it ignores that courts have held that written justifications for withholdings should be made promptly and separately from summary judgment briefing. *See People ex rel. Brown v. EPA*, 2007 WL 2470159 (N.D. Cal. Aug. 27, 2007); *Keeper of Mountains Found. v. DOJ*, 2006 WL 1666262 (S.D. W.Va. June 14, 2006); *Schulz v. Hughes*, 250 F. Supp. 2d 470 (E.D. Pa. 2003); *Prov. Journal Co. v. U.S. Dep't of Army*, 769 F. Supp. 67 (D.R.I. 1991); *Ferguson v. FBI*, 729 F. Supp. 1009 (S.D.N.Y. 1990); *Knight Pub. Co. v. DOJ*, 608 F. Supp. 747 (W.D.N.C. 1984). These courts have reached the conclusion that early production of a *Vaughn* index is an effective way to address the power imbalance present in each FOIA action.

As the U.S. District Court for the District of Rhode Island explained: "Ordinarily, rules of discovery give each party access to the evidence upon which the court will rely in resolving the dispute between them. In a FOIA case, however, because the issue is whether one party will disclose documents to the other, only the party opposing disclosure will have access to all of the facts." *Prov. Journal Co.*, 769 F. Supp. at 68. "It would be unfair," the court continued, "to allow the [defendant] months to prepare its case and then force the [plaintiffs] to formulate their

entire case within [the short time] they have to respond to that motion." *Id.* at 69 (quotation marks and citation omitted).

The reality of FOIA litigation is that *Vaughn* indices are prepared by the agency and precede and drive the drafting of a summary judgment motion. Defendant offers no explanation as to why it would be impractical or unreasonable to require it to prepare an index of the withholdings before briefing a summary judgment motion. Nor can it provide such an explanation — especially where only six documents are at issue and, under Plaintiff's proposed schedule, Defendant will have made withholding determinations at least a week in advance.[6]

Defendant also seeks to introduce further delay when it asserts that, after production of documents, Plaintiff would "then challenge[] . . . the government's withholdings" and only then will it produce a *Vaughn* index. Opp'n at 4. By failing to comply with the statutory deadlines for responding to Plaintiff's request, Plaintiff is deemed to have exhausted its administrative remedies and is entitled to bring this lawsuit. *See* 5 U.S.C. § 552(a)(6)(C)(i). The time has passed for Defendant to make administrative releases, which Plaintiff is then required to decide whether to challenge in court. Defendant is in court now, Plaintiff has already challenged all of Defendant's improper withholdings, *see* Dkt. ¶¶ 51-61, and the next required step is the production of a *Vaughn* index.

CONCLUSION

For the foregoing reasons and those set forth in Plaintiff's memorandum of law in support of its motion the Court should grant Plaintiff's motion to expedite.

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[6] It is also of no moment that Defendant apparently takes issue with the form of the *Vaughn* index. *See* Opp'n at 4. As courts have recognized, "it is the function, not the form, of the index that is important," *Halpern v. FBI*, 181 F.3d 279, 291 (2d Cir. 1999) (quoting *Keys v. DOJ*, 830 F.2d 337, 349 (D.C. Cir. 1987)); *see also* Mem. at 5 n.3, 9 (using "*Vaughn* index" and "written justifications" interchangeably).

New York, New York
December 21, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2017, in accordance with Judge Gardephe's individual rules of practice for civil cases, I served the foregoing document on the following counsel by email and overnight Federal Express:

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