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.: 5:17-cv-11149-JEL

Judge Judith E. Levy

JOINT STATUS REPORT

On September 26, 2017, the Parties in the above-captioned matter, through their respective counsel, conferred pursuant to this Court's September 7, 2017 Order Regarding Production and Setting of Dates (Dkt. No. 35). The Order directed the Parties to file a joint submission regarding review and production of email records, confirming that a redacted organizational chart was produced, providing a description by defendants of the type of recordkeeping systems and types of records where responsive materials may be found, and updating the court on discussions regarding the timeframe to be applied to Plaintiffs' FOIA requests.

The Parties incorporate by reference the previously filed Joint Case Management Report/Discovery Plan (Dkt. No. 32) and the Second Joint Case

Management Report/Discovery Plan (Dkt. No. 33). Defendants' further incorporate by reference Defendants' Proposal for Review and Production of Email Records (Dkt. No. 36). Plaintiff further incorporates by reference Plaintiff's Response to Defendants' Proposal for Review and Production of Email Records (Dkt. No. 37).

In this Joint Status Report, the Parties focus on the issues raised in the Court's September 7, 2017 Order not previously addressed by the Parties' submissions.

In light of the numerous unresolved issues, Plaintiff respectfully requests that the Court reschedule the status conference previously scheduled for November 8, 2017 to the earliest available date between the present and October 20, 2017.

Defendants take no position on the general question of whether the status conference currently scheduled for November 8, 2017 should be rescheduled, but reiterate their request in their September 15 filing that, consistent with the Court's September 7 order: (1) the Court allow the agency until October 16, 2017, to "propose a firm date for review and production of the email records from the initial six identified custodians"; (2) Plaintiff be given until Friday, October 20, 2017, to "respond to Defendants' proposal," and; (3) that the parties be given until Monday, October 30, 2017 to "file a joint submission to the Court regarding review and

production of the email records." Additionally, undersigned counsel for Defendants notes that she will be on religious leave and thus unavailable to participate in a status conference on October 5, 6, 12, and 13, 2017.

1. FOIA Search Date Range

Plaintiff's Statement

Plaintiff understood this Joint Status Report as setting out the issues in dispute, not as briefing on the merits. Given that the Defendants provided Plaintiff with their positions late on the night of September 28, 2017, and have given Plaintiff a 1 p.m. deadline on September 29, 2017 to respond, Plaintiff cannot respond to their extensive legal arguments here. But Plaintiff does not believe that this filing is the right time for such briefing. The right place is in the motion for partial summary judgment on this issue that Plaintiff asks leave to file below. The Court can then decide the date cut-off issue on full briefing.

During the September 26, 2017 conference, Defendants reiterated their position that the agency's search will be limited to responsive documents created between January 27, 2017 and February 4, 2017. Plaintiff believes this date range is unreasonable given the continuing language of the FOIA requests, the date of filing of the FOIA requests, and the evolving circumstances surrounding the subject of the FOIA request. Plaintiff's FOIA requests are not limited to a particular time frame. For example, the FOIAs seek "[r]ecords created on or after

January 27, 2017." FOIA Requests at 5 (Dkt. No. 1-2, Exhibits A and B). Similarly, the FOIAs not only seek documents related to court decisions and DHS guidance that had been issued at the time the FOIAs were filed, but also records concerning "[a]ny other judicial order or executive directive issued regarding the Executive Order on or after January 27, 2017," namely, future orders or directives. FOIA Requests at 6. The FOIAs also sought "guidance that was 'provided to DHS field personnel shortly' after President Trump signed the Executive Order," which is clearly continuing. FOIA Requests at 7. Those responsive documents include documents related to the Revised Executive Order issued by President Trump on March 6, 2017, to court orders regarding the initial and revised Executive Orders, and to executive directives regarding implementation of those court orders. The Parties were unable to achieve any consensus on this issue.

For this reason, Plaintiff informed Defendants of their intent to file a Motion for Partial Summary Judgment in accordance with Local Rule for the Eastern District of Michigan 7.1(b)(2). Defendants indicated their intent to oppose any motion for partial summary judgment.

Accordingly, Plaintiff seeks leave of the Court to file a partial summary judgment motion with respect to the FOIA search cut-off date and asks this court to treat Plaintiff's request in this status report as a request for leave to file under L.R. 7.1(b)(2) and to issue an order granting leave. *See Lexicon, Inc. v. Safeco Ins.*

Co. of Am., 436 F.3d 662, 670 n.6 (6th Cir. 2006) (noting district courts discretion to permit successive motions for summary judgment). Partial summary judgment is appropriate at this stage in the litigation because there is no genuine issue of material fact and plaintiffs are entitled to judgment as a matter of law on their claim that the FOIA search cut-off dates applied by Defendants were inappropriate.

Leave to file this initial partial summary judgment motion at this early stage of the proceeding on this narrow issue—without prejudice to Plaintiff's ability to file a second motion for summary judgment after production—should be granted as extraordinary resources and time will be wasted if the Parties wait to resolve the timing dispute until after the production of documents, which may take Defendants many months (if not years). Defendants cannot provide Plaintiff with an idea of when it would receive even the initial round of documents, and to wait indefinitely for their production only to have a finding that their date range was inappropriately narrow would subject Plaintiff to another unacceptably long waiting period for documents. Because the February 4, 2017 cut-off is obviously too narrow, if summary judgment motion practice regarding the date range is delayed until after a complete production of documents has been made, Defendants would be forced to go through this entire exercise again—and the public will be no closer to the information it is entitled to on this issue of pressing concern.

Defendants' Statement

During the September 26, 2017 conference, Defendants explained again why the agency has applied a date range of January 27, 2017 to February 4, 2017 to Plaintiff's request. As Defendants explained, the overwhelming legal authority establishes that a "date-of-search cut-off date is reasonable [in FOIA], even if subsequent searches are conducted, to avoid 'an endless cycle of judicially mandated reprocessing.'" *McClanahan v. U.S. Dep't of Justice*, 204 F. Supp. 3d 30, 47 (D.D.C. 2016) (quoting *Bonner v. U.S. Dep't of State*, 928 F.2d 1148, 1152 (D.C. Cir. 1991)). However, also relevant to the question of whether an agency's search was adequate, which includes whether the agency searched for records from a reasonable time period, is the question of where (and from what time period) the agency reasonably believes responsive records are likely to be found. *See, e.g.*, *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325-26 (D.C. Cir. 1999) (at summary judgment, the agency must "demonstrate beyond a reasonable doubt that its search was 'reasonably calculated to uncover all relevant documents.'"). In this particular case, as Defendants have explained to Plaintiff, the agency does not believe responsive records exist beyond February 4, 2017.

Plaintiff's requests ask for records related to CBP's "interpretation, enforcement, and implementation" of EO 13,769. EO 13,769 was issued on January 27, 2017 and was enjoined on a nationwide basis on February 3, 2017.

Following that nationwide injunction, guidance was sent from the Acting Commission to CBP leadership on February 3, 2017 to stop enforcement of the provisions of EO 13,769 which were enjoined. A copy of that guidance has been released to Plaintiff and its effect is supported by Excel spreadsheets that have been released to Plaintiff showing that the last traveler processed under EO 13,769 was processed on February 4, 2017). For purposes of a grace period, the agency pulled almost 30 additional hours of emails after the time of the stop enforcement email (the remainder of February 3, 2017 and all of February 4, 2017).

As Defendants have also explained, as to the question of when the agency began "searching" for records responsive to Plaintiff's request, it is hard to divorce the agency's search for records responsive to the DHS Office of Inspector General (OIG) investigation from the agency's search for records responsive to Plaintiff's (and the other ACLU affiliates') FOIA requests. The agency initially received a formal request for records related to the EO implementation from the DHS OIG on February 1, 2017 and almost immediately began its search. In response to that request, the agency searched for and produced its first set of responsive documents to the OIG on February 3, 2017. Some of the products of this electronic and manual search process were also responsive to the ACLU FOIA requests and ultimately became records that the agency has produced for Plaintiff in the last few months. Accordingly, Defendants assert that the agency's search for records

responsive to Plaintiff's requests commenced on or before the date of Plaintiff's first FOIA request (given the significant overlap with the OIG search).

During the September 26, 2017 conference, Plaintiff advised Defendants that Plaintiff believes the search cut-off date should be either September 25 or 26, 2017. To accept Plaintiff's position – which has been a moving target at least until mere days ago – would be to ignore the D.C. Circuit's admonishment that "courts must be wary of creating 'an endless cycle of judicially mandated reprocessing' of FOIA requests." *ACLU v. U.S. Dep't of Justice*, 640 Fed. App'x 9, 13 (D.C. Cir. 2016). *See also Bonner*, 928 F.2d at 1152; *McClanahan*, 204 F. Supp. 3d at 47. It is also inconsistent with DHS's own FOIA regulations, which provide that "[i]n determining which records are responsive to a request, a component ordinarily will include only records in its possession as of the date that it begins its search." 6 C.F.R. § 5.4(a). Because the overwhelming weight of legal authority supports the date range applied by the agency, Defendants will oppose any motion by Plaintiff for summary judgment on this issue.

Defendants also oppose Plaintiff's request for leave to file a partial summary judgment motion at this stage. "Generally, FOIA cases should be handled on motions for summary judgment, *once the documents in issue are properly identified*." *Miscavige v. IRS*, 2 F.3d 366, 369 (11th Cir. 1993) (cited in *Rodriguez v. U.S. Dep't of Army*, 31 F. Supp. 3d 218, 225 (D.D.C. 2014)). Moreover, at the

summary judgment stage, an agency meets its burden of demonstrating that it "made a good faith effort to conduct a search using methods which can be reasonably expected to produce the information requested," *DiBacco v. U.S. Army*, 795 F.3d 178, 188 (D.C. Cir. 2015) (internal quotations and citation omitted), through the submission of a "reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched." *Ancient Coin Collectors Guild v. U.S. Dep't of State*, 641 F.3d 504, 514 (D.C. Cir. 2011) (internal quotations and citation omitted). An agency's affidavit is "accorded a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents." *Mobley v. CIA*, 806 F.3d 568, 581 (D.C. Cir. 2015) (internal quotations and citation omitted). Only where "a review of the record raises substantial doubt, particularly in view of 'well-defined requests and positive indications of overlooked materials," should summary judgment be denied to an agency and awarded to a plaintiff. *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 314 (D.C. Cir. 2003). Under these well-established standards, the record on which this Court should evaluate the adequacy of the agency's search, which includes the date range it applies to its search, will necessarily be incomplete before the agency completes its search for and processing of records responsive to Plaintiff's requests. Accordingly, Plaintiff

should be permitted to assert arguments challenging the adequacy of the agency's search in summary judgment briefing after the agency has provided Plaintiff with a final response to its requests, and no sooner. Finally, in light of Plaintiff's stated position that the date range should extend until this week, Plaintiff has no likelihood of success on such a motion and, accordingly, allowing the sort of piecemeal litigation Plaintiff proposes would be judicially inefficient, wasting the Court's and the parties' time.

2. Native Format

Plaintiff's Statement

Plaintiff provided additional clarification about its request in the September 20, 2017 response to Defendants' proposal. Plaintiff clarified that it requested that Defendants produce all Excel spreadsheet files in either .xls or .xlsx and all other documents as fully searchable PDF files. During the meet and confer, Defendants were unable to commit to providing Excel spreadsheets in .xls or .xlsx format. Defendants now take the position that they should not have to provide Excel spreadsheets in their native format. This stands in clear contrast to the DOJ's guidance on this issue, which states that FOIA "require[s] agencies to honor a requester's specified choice among existing forms of a requested record" and

entitles "the requester, not the agency … to choose the form of disclosure when multiple forms of a record already exist."[1]

In addition to requesting Excel spreadsheet files in .xls or .xlsx format, Plaintiffs also reiterated their request that all PDF files be fully searchable. This is especially important since Plaintiff discovered today, September 29, 2017, that the majority of PDF files included in previous disclosures are not searchable in their entirety, despite Defendants' previous representations (which Defendants represent were made in good faith). While individual pages within certain PDF files are occasionally searchable, searchable pages within the disclosed PDF files are sporadic. Plaintiffs brought this issue to Defendants' attention today, Defendants are committed to producing fully searchable PDFs whenever practicable, and the Parties are discussing the issue in an effort to reach agreement about a searchable PDF format.

The Parties have not reached agreement on this issue, and Plaintiff reiterates its request that Defendants produce all Excel spreadsheet files in their native .xls or .xlsx format and that all PDF files be fully searchable, as is Plaintiff's right.

[1] *FOIA Update: Congress Enacts FOIA Amendments*, The United States Department of Justice, Office of Information Policy (Jan. 1, 1996), https://www.justice.gov/oip/blog/foia-update-congress-enacts-foia-amendments.

Defendants' Statement

As Plaintiff notes, all documents that the agency has released so far in this case have been provided in searchable .pdf files. Plaintiff has requested that Defendants produce "all Excel spreadsheet files . . . in their Native .xls or .xlsx format" or "in a format capable of manipulation." Pl.'s Resp. 9-10. Defendants fully considered Plaintiff's request and have determined that they are unable to produce the Excel spreadsheet files in the format Plaintiff seeks. Defendants maintain that they cannot produce the Excel spreadsheets in "a format capable of manipulation" for the very reason that it creates the unreasonable risk that a member of the public (because documents released in a FOIA action must be made available to the public as a whole) might alter the data in those spreadsheets and represent the data as CBP information based on the Bates numbers or other markings attached to the files. Defendants could produce the Excel spreadsheets in native format with protection that prevents the data from being manipulated, but that would not be qualitatively different from the searchable PDF format in which the agency has already produced these spreadsheets. Accordingly, Defendants maintain that they should not be required to provide Excel spreadsheet files in their native format.

3. Production of Organizational Chart

On September 15, 2017, Defendants produced redacted copies of organizational charts for the Detroit Field Office, CBP Sault Ste. Marie office, the Port of Detroit Metropolitan Airport, and the Port of Detroit (which includes both the Detroit-Windsor Tunnel and the Ambassador Bridge).

4. Recordkeeping Systems and Location of Responsive Documents

Plaintiff's Statement

During the parties' conversation on September 26, 2017, Defendants indicated that there are three systems in addition to the emails already identified containing records responsive to Plaintiff's FOIA requests: (1) a video system, (2) text messages, and (3) a TECS system database. While these three additional systems are likely to contain responsive documents, Defendants indicated that they continue to prioritize email records. Given this focus, Plaintiff requested assurances as to efforts to preserve text messages and any records in the video and TECS systems. Defendants explained that whether videos and text messages created at and by employees of the individual Ports are records within Defendants' control, for the purposes of their FOIA responsiveness, depends on the local Port policy. Plaintiff asked if the videos and text messages at the Ports relevant to this litigation are within the Defendants' control, and whether a litigation hold has been issued to preserve these records, and Defendants could not provide an answer at

that time. Defendants' position below appears to be that there are no responsive text messages or videos, and that a litigation hold covering these records has already been issued. To the extent text messages and videos responsive to Plaintiff's FOIA requests exist, Plaintiff believes they should be produced.

Furthermore, Plaintiff expressed confusion regarding Defendants' treatment of data from the TECS system. Plaintiff understood Defendants to be claiming that the aggregate data from the TECS database, which includes data derived from the forms themselves, was responsive to Plaintiff's FOIA requests but that the underlying forms entered into the TECS database were *not* deemed responsive. Based on Defendants' statement below, this appears based on the belief that Plaintiff only requested aggregate information about travelers. Plaintiff does not believe it only requested aggregate information, and the parties were not able to reach agreement on this matter.

Defendants' Statement

The following is "a description . . . of the type of recordkeeping systems and types of records where responsive documents might be maintained," as required by the Court's September 7 order:

There are four types of records potentially at issue in this case:

(1) *Email*. The agency's email system to be likely to contain responsive records and searches and processing of email records are currently underway.

(2) *Text or Instant Messages*. Defendants determined that across the agency, it was possible that text messages on government-issued cell phones might contain records to Plaintiff's request. The agency determined that it had no systematic way to search the text and instant messages across the agency. Accordingly, the agency asked local leadership at each port of entry whether staff and officials at that port of entry communicated about Executive Order 13,769 via text or instant message. With respect to the Detroit Field Office and in the ports of entry that are the subject of Plaintiff's request, local leadership reported that staff and officials at those ports of entry did not communicate about Executive Order 13,769 via text or instant message.

(3) *Video*. Plaintiff has indicated that it believes video of the agency processing travelers subject to the EO and video of protestors at airports would be responsive to its request. The agency disagrees but nonetheless provides the following descriptive information regarding the relevant video record systems. Video is maintained on one of three systems: (i) CBP owned and operated Centralized Area Video Surveillance System ("CAVSS"); (ii) CBP owned and operated "stand alone systems"; and (iii) third party, typically airport-operator-owned, systems. The vast majority of camera systems at international airports are owned by third parties and the agency's access to these systems varies by location.

While Defendants do not consider video of CBP processing of individual travelers responsive to Plaintiff's request, more importantly, even if it were, it would be unreasonably burdensome to the agency to search video for material responsive to that request. Such a search would require: (i) sorting through the list of travelers subject to the EO; (ii) determining what time each traveler entered secondary; (iii) determining if video of that time and location exists; (iv) determining if that video is within the agency's possession and control; (v) reviewing the video to determine if any camera angle captured the individual traveler; (vi) confirming that the individual traveler on the video was actually subject to the EO; and (vii) blurring that individual, and any other individual captured in the video, as well as any other image in the video that captures personal identifying information ("PII") pursuant to FOIA Exemptions 6 and 7(C). Essentially, the agency would have to expend enormous time and resources to produce a video of little value (and, at best, questionable responsiveness).

In addition, to the best of the agency's knowledge, all three types of video systems only capture images in what is referred to as the Federal Inspection Services area (FIS). *See* 19 CFR 122.181. Because any protesters at airports would have been present outside of the FIS area, even if videos of protesters at airports were responsive to Plaintiff's requests the agency reasonably believes that

the video systems are unlikely to contain responsive material concerning EO protests at airports.

(4) *TECS*. TECS is an overarching law enforcement system, composed of a number of sub-systems, that contains information about persons and goods crossing the border. The primary System of Records Notice for TECS is available here: https://www.gpo.gov/fdsys/pkg/FR-2008-12-19/html/E8-29807.htm. The Privacy Impact Assessment (PIA) discussing the TECS Platform may be found here: https://www.dhs.gov/sites/default/files/publications/DHS-PIA-ALL-021%20TECS%20System%20Platform.pdf. The PIA explaining CBP Primary and Secondary Processing is located at: https://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_cbp_tecs.pdf.

Defendants do not believe TECS records are responsive to Plaintiff's requests given that Plaintiff's requests focus on aggregate numbers of travelers (not specific traveler records). Moreover, in the Excel spreadsheets that the agency has previously released to Plaintiff, the agency has already provided all the fields of data contained in TECS records that it believes it would be able to release publicly. (Defendants note that these Excel spreadsheets actually contain detail about individual travelers that goes beyond the scope of Plaintiff's requests for aggregate numbers. Additionally, the Excel spreadsheets already existed in the agency's files well before the agency released them to Plaintiff in July; to provide them to

Plaintiff, the agency simply withheld from the identified files all PII and law enforcement sensitive information that is exempt from disclosure under FOIA Exemptions 6, 7(C), and 7(E)). Moreover, even if TECS records regarding individual travelers were responsive to Plaintiff's request for aggregate numbers, similar to the video records, the agency believes that searching for and processing individual TECS records would be unreasonably burdensome. Essentially, the agency would be required to expend a great deal of time to identify hundreds of individual TECS records only to withhold in full or redact virtually all the information in those records.

At the time the agency received Plaintiff's FOIA request, litigation hold notices were already in place agency-wide directing all CBP personnel and offices directing the preservation of all documents and information potentially relevant to the subject matter covered by Plaintiff's request. These litigation hold notices, which remain in effect, cover a broad range of recordkeeping systems and record types, including all of the recordkeeping systems and record types described above.

5. Timeframe for Review and Production

Plaintiff's Statement

On September 20, 2017, Plaintiff filed their response to Defendants' proposal with the Court and noted their opposition to the Defendants' proposed extension and failure to provide a date certain for the initial production. In

response to Defendants' unreasonable production rate proposal and failure to propose a date certain, Plaintiff proposed a production schedule of 49,500 pages per month. Defendants did not provide a date certain during the September 26, 2017 conference and continued to indicate that more time is required before they can be in a position to do so. Plaintiff believes the Court's intervention is necessary to resolve this issue and believes a telephonic conference prior to the November 8, 2017 conference is necessary.

Moreover, as of the date of this filing, Defendants have not provided Plaintiff or other ACLU affiliates any correspondence concerning the prioritization of the various FOIA requests as indicated at the status conference before the Court. Defendants indicated in an email on September 18, 2017 that this letter is delayed as the Defendants continue to gather additional information about the universe of responsive records and reevaluate their approach to the search and review. In response to the Defendants' repeated request for Plaintiff to coordinate with other ACLU affiliates, Plaintiff reiterated their opposition to the Defendants' request that plaintiffs negotiate against themselves.

Defendants' Statement

Plaintiff's proposal that the agency produce 49,500 pages per month – and its assertion that this "is a reasonable rate of production" – wrongly assumes that document review for civil discovery, on the one hand, and review and processing

of documents in response to FOIA requests, on the other, are comparable. They are not. *Stonehill v. IRS*, 558 F.3d 534, 538-39 (D.C. Cir. 2009) ("The FOIA disclosure regime . . . is distinct from civil discovery." (citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 144 n.10 (1975)); *see also* 15 Francis M. Dougherty, et al., Federal Procedure § 38:11 (Law. Ed. Sept. 2017). First, "[d]ifferent considerations determine the outcome of efforts to obtain disclosure: relevance, need, and applicable privileges—bounded by the district court's exercise of discretion—in the discovery regime, [and] statutory exemptions reflecting a congressional balancing of interests in FOIA." *Stonehill*, 558 F.3d at 538 (citations omitted). As the D.C. Circuit, which handles appeals from a significant portion of the nation's FOIA actions and is widely recognized for its expertise in the subject matter, has explained:

> [T]he stakes of disclosure are different in the two regimes, justifying and arguably necessitating separate reviews with distinct considerations in mind during each. Documents released in a FOIA action must be made available to the public as a whole, and, unlike in civil discovery, there is no opportunity to obtain a protective order. In that respect, the stakes of disclosure for the agency are greater in the FOIA context.

Stonehill, 558 F.3d at 539-40; *see also Clay v. U.S. Dep't of Justice*, 680 F. Supp. 2d 239, 248 (D.D.C. 2010).

A rate imported from the civil discovery context, moreover, would not account for the greater time required when reviewing and processing a document

in consideration of FOIA's nine statutory exemptions (some of which require consultation with subject matter experts and officials in other government agencies and offices), rather than simply reviewing a document for relevance, need, and a few applicable privileges. Additionally, as Defendants explained in their September 15 filing, records responsive to the ACLU field office requests go through three stages of review. Plaintiff's proposal assumes each document will only be reviewed by a single reviewer. Therefore, even if the per page review time for FOIA were comparable to that for civil discovery (which it is not), to account for the agency's three stages of review, at the very least Plaintiff's proposed processing rate should have been divided by three.

Plaintiff has identified no case or circumstance in which a court has ordered a federal agency to respond to a FOIA request at a processing rate that even remotely approaches the rate Plaintiff proposes. Even in cases where a court has entered a preliminary injunction order imposing an accelerated processing schedule, those orders have imposed processing rates many times less than 49,500. For example, in *ACLU v. Department of Defense*, 339 F. Supp. 2d 501, 502-03, 505 (S.D.N.Y. 2004), on a motion for preliminary injunction, the court ordered three agencies and four components of an agency to process a total of between 17,000 and 20,000 pages in one month, or a total of fewer than 3,000 pages per federal entity. Similarly, in *Judicial Watch, Inc. v. U.S. Department of Energy*,

191 F. Supp. 2d 138, (D.D.C. 2002), upon the plaintiff's request for emergency relief, the court ordered the Departments of Transportation and Commerce to process approximately 6,000 pages and 9,000 pages, respectively, in two months. By Defendants' research, the most burdensome production rate a court has imposed on a federal agency occurred in *NRDC v. Department of Energy*, 191 F. Supp. 2d 41, 42-43 (D.D.C. 2002), where, following a motion from the plaintiff for emergency relief, the court ordered the Department of Energy to process "the vast majority of" approximately 7,500 pages in 32 days. Notably, Plaintiff has not moved for a preliminary injunction or other emergency relief here, nor does legal authority support granting such relief, had they so moved.

And in cases (such as this one) where emergency relief was not ordered or found justified, and where courts have imposed processing rates, those rates are substantially lower. The litigation over FOIA requests to the Department of State seeking email records of former Secretary of State Hillary Clinton offer helpful perspective in this regard. There, the court-ordered global processing rate across the large universe of such cases was less than 7,000 pages per month. *See* Dkt. 17 in *Leopold v. U.S. Dep't of State*, no. 15-0123 (D.D.C. May 27, 2015) (establishing rolling production schedule for 55,000 pages of email records to be completed by January 29, 2016). Notably, this rate covered releases in dozens of cases. Additionally, it was based on an understanding of the defendant agency''s FOIA

processing resources; as a cabinet-level department – rather than one component of a department, as CBP is – the Department of State's resources were multiple times greater than the resources of the agency here.

Nor have Defendants, as Plaintiff accuses, "flouted the Court's order to provide a date certain." Pl.'s Resp. 2. As Defendants' September 15 filing makes clear, "in an effort to determine 'a firm date for review and production of the email records from the initial six identified custodians' as required by the Court's September 7, 2017, the agency undertook to estimate the total number of potentially responsive pages requiring FOIA review and processing across the 19 ACLU field office requests." Defs.' Prop. 4. As a result of the agency's calculations, the agency estimated that using the search terms suggested by Plaintiff, there were approximately 864,000 potentially responsive pages requiring FOIA review and processing.[2] *Id.* Because Defendants estimated that processing a

[2] Contrary to Plaintiff's assertion, Pl.'s Resp. 4, in Defendants' September 15 filing, Defendants did not propose a processing rate of 5,700 pages per month. Rather, Defendants simply reported that in the first 8 months of this fiscal year, the agency processing and released records in response to FOIA requests at an average rate of approximately 5,700 pages per month. As Defendants explained in their September 15 filing, such a processing rate would "assume[] that the agency would devote all of its current FOIA resources exclusively to the[] 19 [ACLU] requests, and devote no attention to any of the approximately 90,000 other FOIA requests the agency is on pace to receive in this Fiscal Year (nor to any that the agency receives in the next 12.5 years), *see* ECF No. 33 at 15, including every expedited FOIA request that the agency received before it received the ACLU requests, each of which would be ahead of the ACLU requests in the agency's FOIA processing

search of that magnitude would consume too many of the agency's resources for too long, Defendants determined that the agency needed to narrow the universe of potentially responsive records for review – and ascertain the number of records that must be processed in that universe – before it could provide "a firm date for review and production of the email records from the initial six identified custodians" as required by the Court's September 7 order.

Defendants are encouraged by Plaintiff's representation that it is "willing to work with Defendants to prioritize among responsive documents and narrow the search," including by "discuss[ing] the existing search terms to see if the terms can be adjusted to reduce the number of potentially responsive pages that need to be reviewed." Pl.'s Resp. 5. As Defendants explained in their September 15 filing, Defendants currently "are analyzing the search results in an effort to understand whether any of the search terms proposed by Plaintiff are over-inclusive, and to try to estimate the actual responsiveness rate of the email messages from the six custodians for this case that contained at least one of the proposed search terms," and Defendants believe that these analyses will aid the discussions Plaintiff has stated it is also prepared to have. Defs.' Prop. 8. However, as Defendants stated, it expected these analyses to require "two more weeks" from the date of Defendants' September 15 filing and, accordingly, as counsel for Defendants advised counsel

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queue," and "be to the exclusion of processing any non-email records in response to the ACLU field office requests." Defs.' Prop. 5.

for Plaintiff during the September 26 meet and confer, Defendants expect to reach out to Plaintiff to begin such discussions early in the week of October 2, 2017.

In addition to the analyses the agency has been undertaking, since its September 15 filing, the agency has taken another important step to improve its FOIA processing and review for this case. Over the last two weeks, the agency has transitioned the collected email files to a new review platform that allows for more efficient processing.[3]

Dated: September 29, 2017

Respectfully Submitted,

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[3] Because the agency has just transitioned the email files to the new platform, it cannot yet predict what processing rate it will be able to achieve using this new platform. Additionally, the agency anticipates that it will take some time for its FOIA processers to become fully trained on and proficient in working with the new platform and, accordingly, it expects processing rates will improve after an initial ramp-up period.

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was served on the attorneys of record in this matter by efiling on September 29, 2017.

The statement above is true to the best of my knowledge, information and belief.

/s/ Gabriel E. Bedoya
Gabriel E. Bedoya