U.S. Department of Justice

United States Attorney
Southern District of New York

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April 20, 2018

BY ECF
The Honorable Andrew L. Carter, Jr.
United States District Judge
Thurgood Marshall United States Courthouse
40 Foley Square, Room 2203
New York, NY 10007

Re: *Knight First Amendment Institute v. U.S. Dep't of Homeland Security et al.*, No. 17 Civ. 7572 (ALC)

Dear Judge Carter:

I write respectfully on behalf of Defendants the United States Department of State ("State") and United States Immigration and Customs Enforcement ("ICE") to request that the Court set a schedule for rolling productions in response to Plaintiffs' Freedom of Information Act ("FOIA") request that requires State to process 300 pages per month and ICE to produce 750 pages per month.[1] District courts have adopted similar schedules, and it reflects a fair and reasonable interpretation of FOIA's requirements. The schedule Plaintiffs proposed—to process or produce 3,000 pages per month—is not practicable. To the contrary, it would comprise approximately one-third of all of ICE's court-ordered processing requirements per month, and require State to dedicate approximately 16% of its FOIA litigation reviewers to this case alone, during a period marked by a surge in FOIA litigation.

A. Procedural History

1. ICE

After Plaintiffs filed this action, Plaintiffs dismissed their claims against ICE due to their failure to exhaust administrative remedies. *See* Dkt. Nos. 30 & 31. Thereafter, Plaintiffs completed the administrative appeal process; ICE conducted another search for responsive documents; ICE located approximately 14,000 pages of potentially responsive documents; and ICE committed to producing at least 500 pages a month. Declaration of Catrina Pavlik-Keenan, dated April 20, 2018 ("Pavlik-Keenan Decl."), ¶¶ 10-16. ICE released its first production on

[1] Processing a document involves, *inter alia*, reviewing a document for responsiveness and applicable exemptions to determine which portions, if any or all, to produce. *See* Declaration of Eric Stein, dated April 20, 2018 ("Stein Decl.") at ¶ 9 n.1. Thus, an agency must generally process more documents in response to a FOIA request that it ultimately produces.

March 7, 2018. *Id.* ¶ 16. Nevertheless, Plaintiffs amended the complaint to add ICE as a defendant. Dkt. No. 42. The ICE FOIA Office, in an effort to reach an agreement in this case, offered to reallocate resources and shift workload to allow it to produce 750 pages on a rolling basis, starting with the third production on May 7, 2018, and subsequent productions following on the 7th day of each month thereafter. Pavlik-Keenan Decl. ¶ 27. Plaintiffs rejected that proposal. *Id.* The ICE FOIA Office also offered to prioritize processing by date range as well as origin of the document (*i.e.*, the ICE component housing the potentially responsive document), if Plaintiffs would agree to a reasonable processing rate. *Id.* Unfortunately, Plaintiffs rejected that offer as well, demanding that ICE process or produce approximately 3000 page per month. *Id.*

2. Other Agencies

While Plaintiffs pursued the administrative appeal with ICE, Plaintiffs and the remaining six agency (or component) defendants in this matter, United States Department of Homeland Security ("DHS"), United States Customs and Border Protection ("CBP"), United States Immigration and Customs Enforcement ("USCIS"), United States Department of Justice ("DOJ") Office of Information Policy ("DOJ-OIP"), DOJ Office of Public Affairs ("DOJ-OPA"), and DOJ Office of Legal Counsel ("DOJ-OLC") negotiated and agreed to narrow the search. *See* Dkt. No. 49. Based on that narrowed request, the agencies searched for and located potentially responsive documents. *Id.* The parties agreed that CBP would complete its production by March 28, 2018; DHS will complete its production by May 15, 2018; USCIS will complete its first production by May 30, 3018, and second production by June 30, 2018; DOJ-OIP will complete its production by May 30, 2018; DOJ-OPA will complete its production by June 15, 2018; and DOJ-OLC will complete an initial production by May 30, 2018. *See id.*

The parties, however, did not reach an agreement regarding State's processing and production schedule. In response to Plaintiffs' narrowed request, State located approximately 850 potentially responsive emails (not including attachments) and 316 other potentially responsive records. *See id.* State has offered to process 300 pages per month, and Plaintiffs have requested that State process 3000 pages per month. State is conducting a relevancy review to attempt to reduce the total number of documents in question.

B. Agencies Are Facing a Surge in FOIA Litigation

In fiscal year ("FY") 2017, courts experienced an "unprecedented increase" in the number of FOIA lawsuits, which rose "an astonishing 26 percent" compared to FY 2016, creating a "real crisis." *See* The FOIA Project, *FOIA Lawsuits Surge in Trump Administration's First Year* (Jan. 16, 2018), at http://foiaproject.org/2018/01/16/lawsuits-trump-first-year/. For example, the District of D.C., where a significant amount of FOIA litigation occurs, has lately seen a dramatic increase in FOIA litigation. Approximately 447 new FOIA cases were filed in D.D.C. in 2017, compared to 246 new cases filed in 2016—an increase of 82 percent in a single year. *See* Dep't of Justice, Freedom of Information Act 2017 Litigation and Compliance Report attach. 1 (2018) (list of Freedom of Information Act cases filed in 2017, compiled from court docket information), https://www.justice.gov/oip/page/file/1040456/download, Dep't of Justice, Freedom of Information Act 2016 Litigation and Compliance Report attach. 1 (2017) (equivalent list for 2016), https://www.justice.gov/oip/reports/2016_list_foia_cases_received_csv/download.

This surge in FOIA litigation has affected both State and ICE. State has experienced a "dramatic . . . increase" in requests beginning in FY 2015, as a result of the presidential election. *Daily Caller v. U.S. Dep't of State*, 152 F. Supp. 3d 1, 12 (D.D.C. 2015). More generally, between FY 2008 and FY 2016, the number of FOIA requests submitted to State increased by more than 350%. Stein Decl. ¶ 16. Currently, State is a defendant in approximately 125 litigations—up from 50 litigations in 2014—and court orders in 15 of those cases require State to process a total of at least 9,500 pages per month. *Id.* ¶¶ 17, 20. In addition, State has committed to making productions in 22 additional cases and anticipates beginning monthly productions soon in another 11 cases, including this one. *Id.* ¶ 20. As a result, the State Department is currently attempting to process at least 16,100 pages per month for matters in litigation, and anticipates adding another 3,300 pages per month in the near future – on top of the tens of thousands of FOIA requests not currently in litigation. *Id.* ¶¶ 16, 20.

ICE is facing similar constraints. ICE received 44,748 FOIA requests in FY 2015, and 54,651 in FY 2018. Pavlik-Keenan Decl. ¶¶ 19-20. By January 31, 2018, over the first four months of FY 2018, ICE had received 54,651 new FOIA requests—or approximately 10,000 more FOIA requests in the first four months of FY 2018 than it received in the *entire* FY 2015. *Id.* In addition, since January 31, 2018, the ICE FOIA litigation processing unit has been working on 54 FOIA litigations, and it is currently processing documents for rolling production in 17 of those cases. *Id*. ¶ 24. The current total average monthly litigation production page count is between 9,000 to 10,500 pages per month, and ICE expects to add another 2,500 pages per month as a result of 3 additional cases. *Id*. Accordingly, ICE is now (or soon will be) required to review and process between 10,500 to 13,000 pages per month. *Id.*

C. Plaintiffs' Proposed Schedule Is Not Practicable

Although both State and ICE granted Plaintiffs' request for expedited processing, Dkt. No. 47 ¶ 48; Pavlik-Keenan Decl. ¶ 8, Plaintiffs' request that ICE and State process 3,000 pages per month is not practicable.

FOIA provides that agencies will "process" expedited requests "as soon as practicable." 5 U.S.C. § 552(a)(6)(E)(iii). When considering whether a proposed schedule is "practicable," courts examine whether an agency has presented "credible evidence" regarding such considerations as the number of "expedited FOIA requests the agency is already processing," the "volume of classified material at issue," "the need for agency staff to review the material," and the "competing . . . obligations to which the same agency staffers who are responsible for gathering and reviewing documents responsive to the FOIA Request must attend." *EPIC v. Dep't of Justice*, 15 F. Supp. 3d 32, 42 (D.D.C. 2014) (internal quotation marks omitted); *cf. Brennan Ctr. for Justice v. U.S. Dep't of Justice*, No. 17 Civ. 6335 (KBF), 2018 WL 637424, at *3 (S.D.N.Y. Jan. 31, 2018) (denying request for preliminary injunction in part due to "the administrative challenges inherent in processing a large number of FOIA requests and the time constraints that competing requests and/or court orders can present").

State and ICE have presented "credible evidence" that attempting to comply with Plaintiffs' proposed schedule would interfere with the ability of the agencies' FOIA staff to meet their competing obligations. Plaintiffs' request would require State to process 3,000 pages per

month, in addition to its current court-ordered amount of 19,400 pages per month, and thus devote approximately 16% of its FOIA litigation reviewers to this case alone. Stein Decl. ¶ 20, 22. Plaintiffs' request would require ICE to increase its entire FOIA monthly production for cases in litigation by approximately one-third. Pivlak-Keenan Decl. ¶ 26. Moreover, because ICE searched for documents responsive to Plaintiffs' original FOIA request—and not the narrowed version negotiated with the other agencies—ICE has located 14,068 potentially responsive documents, more than any other agency. *Id.* ¶ 15. Thus, while most, if not all, of the material ICE must process and produce does not appear to be classified, it is voluminous due to the breadth of Plaintiffs' (non-narrowed) requests. ICE has therefore not received the benefit of a negotiated search scope, and should not be penalized for conducting the expansive search Plaintiffs requested.

D. The Court Should Grant Defendants Additional Time to Process

The Court should "allow the agenc[ies] additional time to complete [their] review of the records," because Defendants face "exceptional circumstances." 5 U.S.C. § 552(a)(6)(C)(i); *see also Citizens for Responsibility & Ethics in Wash. ("CREW") v. FEC*, 711 F.3d 180, 189 (D.C. Cir. 2013). The "exceptional circumstances provisions allow agencies to deal with broad, time-consuming requests (or justifiable agency backlogs)." *Id.* Courts have found exceptional circumstances where agencies show (1) a "dramatic one-year increase" in the number of FOIA requests, (2) that they are "presently engaged in extensive litigation," (3) that the "ongoing litigation has . . . strained . . . FOIA-related resources," and (4) that the agency "is taking steps to reduce the present backlog." *Daily Caller*, 152 F. Supp. 3d at 12. An agency's need for "more time to respond to a particularly burdensome request" is precisely the type of situation that the exceptional circumstances provisions are meant to address. *CREW*, 711 F.3d at 189.

Here, Defendants have shown each factor that led to a finding of "exceptional circumstances" in *Daily Caller*. First, State has experienced a 350% increase in FOIA requests since FY 2006, and ICE received more FOIA requests in the first four months of FY 2018 than it received in all of FY 2015. Stein Decl. ¶ 16; Pivlak-Keenan Decl. ¶ 20. Second, both are engaged in extensive litigation, as State is currently a defendant in approximately 125 cases and ICE in 54. Stein Decl. ¶ 17; Pivlak-Keenan Decl. ¶ 24. Third, such increased litigation has strained the agencies' resources, and Plaintiffs' proposed schedule would compound that strain. Stein Decl. ¶ 17, 22; Pivlak-Keenan Decl. ¶ 23, 26. Finally, despite the burdens they currently face, State and ICE have managed to reduce, or at least control, their backlogs. Stein Decl. ¶ 16 (since the end of FY 2016, reducing backlog of 22,600 FOIA requests by half); Pivlak-Keenan Decl. ¶ 20 (reducing yearly backlog from approximately 800 requests to approximately 500). These facts demonstrate exceptional circumstances.

Moreover, when assessing "exceptional circumstances," the Court must consider the Plaintiffs' "[r]efusal . . . to reasonably modify the scope of [their] request or arrange an alternative time frame for processing . . . after being given an opportunity to do so by the agency." 5 U.S.C. § 552(a)(6)(C)(iii). As noted above, ICE offered to attempt to increase its production rate from 500 to 750 pages per month, and also offered ways to prioritize producing documents, including by date range and office of origin. Pivlak-Keenan Decl. ¶ 27. Plaintiffs rejected all offers. *Id.*

E. Defendants' Request Is Consistent with Courts' Practices

State's proposal that it process 300 pages per month, and ICE's proposal that it produce 750 pages per month, is consistent with courts' prevailing practice in FOIA cases. Courts have adopted similar schedules in ten recent cases. *Middle E. Forum v. U.S. Dep't of Homeland Sec.*, No. 17 Civ. 767 (RCL) (GMH), 2018 WL 1178022, at *3–4 (D.D.C. Mar. 5, 2018) ("On this record, 500 pages per month is an appropriate rate of production."); *id.* at *3 n.3 (noting that, "[i]n a number of recent cases in this District, a production rate of 500 pages per month has been approved," and collecting cases); *Republican Nat'l Comm. v. U.S. Dep't of State*, No. 16 Civ. 486 (JEB), 2016 WL 9244625, at *1 (D.D.C. Sept. 16, 2016) (500 pages per month); *Energy & Env't Legal Inst. v. U.S. Dep't of State*, No. 17 Civ. 340 (D.D.C.), Minute Order of August 22, 2017 (300 pages per month); *Judicial Watch, Inc. v. U.S. Dep't of State*, No. 17 Civ. 205 (D.D.C.), Minute Order of June 30, 2017 (300 pages every four weeks); *Am. Ctr. for Law & Justice v. U.S. Dep't of State*, No. 16 Civ. 2516 (D.D.C.), Minute Order of June 27, 2017 (process 400 pages per month); *Citizens United v. U.S. Dep't of State*, No. 16 Civ. 67 (D.D.C.), Dkt. No. 17 at 3 (declining "to adopt Plaintiff's proposed production order of 2000 pages per month" and instead holding State "to its 300-page commitment"); *Freedom Watch v. Bureau of Land Mgmt.*, No. 16 Civ. 2320 (D.D.C.), Minute Order of June 13, 2017 (500 pages every 30 days); *Citizens United v. U.S. Dep't of State*, No. 15 Civ. 1720 (D.D.C.), Dkt. No 11 ¶ 10 (500 pages every four weeks); *Judicial Watch, Inc. v. U.S. Dep't of State*, No. 15 Civ. 687 (D.D.C.), Minute Order of April 4, 2017 (500 pages per month); *Leopold v. U.S. Dep't of State*, No. 14 Civ. 1770 (D.D.C.), Dkt. No. 33 at 1 (review 400 pages per month).

While Plaintiffs note that courts have "expressed concern" over certain processing rates, Dkt. No. 48 at 11 (citing *Brennan Ctr. for Justice v. U.S. Dep't of State*, No. 17 Civ. 7520 (PGG), 2018 WL 369783, at *3 (S.D.N.Y. Jan. 10, 2018), and *ACLU v. Dep't of Defense*, 339 F. Supp. 2d 501 (S.D.N.Y. 2004)), those cases are inapt. In *Brennan Center*, for example, there were only six documents in dispute, *id.* at *7, resulting in the court ordering the agency to produce those documents within 30 days. Similarly, in *ACLU*, despite 11 months having passed since plaintiff filed its FOIA request, "no documents have been produced by defendant; [and] no documents have been identified." 339 F. Supp. 2d at 502-03. Here, by contrast, both State and ICE have located potentially responsive documents; those documents total more than 15,000 pages; State and ICE have both proposed processing and/or production schedules; and ICE has already begun production.

Plaintiffs also point to *Seavey v. Dep't of Justice*, 266 F. Supp. 3d 241, 248 (D.D.C. 2017), where the court ordered the FBI to process 2,850 pages per month. However, in that case, the FBI identified more than 100,000 pages of responsive documents and offered to process 500 pages per month, which would have resulted in completing production in 201 months—approximately 13 years longer than the FBI's internal policy of completing FOIA productions within 3 years. Accordingly, the court noted, "Given that there are roughly 102,000 pages awaiting processing, the FBI could meet the three year goal by processing 2,850 pages per month." *Id.* Here, by contrast, State's proposed processing rate would result in completing production within

approximately months[2]; and ICE's proposed processing rate would result in completing production within approximately 18 months.

The agencies are mindful that in a recent case, *National Immigration Project v. U.S. Dep't of Homeland Security*, 18 Civ. 659 (RA) (S.D.N.Y. Apr. 6, 2018), the court ordered State to process 1,500 pages per month. *See* Dkt. No. 55. However, in that case, plaintiff had requested that State to process 3000 pages per *week*, *see id.*, and thus the court reached a compromise closer to the agency's request than State's. Furthermore, the court's decision in that case has significantly added to State's processing burden, requiring State to redirect resources to that case, and making any additional court-ordered deadlines that much more difficult to meet.

For the reasons set forth above, ICE and State respectfully request that the Court enter a schedule that requires State to process 300 pages per month and ICE to produce 750 pages per month. We thank the Court for considering this request.

Respectfully,

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[2] Because 850 of the potentially responsive documents are emails that may include attachments, it is not possible at this time to precisely determine the number of responsive pages the State FOIA Office must review; accordingly, the completion schedule is an approximation.