U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street
New York, New York 10007

May 29, 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 Defendant the Office of Legal Counsel of the United States Department of Justice ("OLC") to request that the Court set a schedule for rolling productions in response to Plaintiffs' Freedom of Information Act ("FOIA") request that requires OLC to process and produce all responsive documents within the next 60 days. For the reasons stated below, the schedule Plaintiff proposes—to process and produce all responsive documents by June 15, 2019—is not practicable.

A. OLC Background

As explained in the Declaration of Paul P. Colborn, Special Counsel in OLC, "OLC is a very small component of the Department of Justice, employing approximately 18 to 25 attorneys at any one time," and its "principal function [] is to assist the Attorney General in his role as legal adviser to the President of the United States and to departments and agencies of the Executive Branch." *Id.* ¶¶ 7-8. Only one attorney has primary responsibility for responding to FOIA requests. *Id.* ¶¶ 8-9. Similar to other agencies and components, OLC has also experienced a surge in FOIA requests over the last year, having received 111 FOIA requests in FY 2016 but 284 in FY 2017 – more than double the previous year. *Id.* ¶¶ 10-11. Moreover, since October 2017, the agency "has received 130 new FOIA requests, putting it on pace to once again receive over 200 requests in FY 2018." *Id.* ¶ 11.

OLC is also experiencing an increase in FOIA litigation. Currently, "there are more than 35 active lawsuits seeking OLC records in which OLC is currently a named defendant or one of the relevant DOJ components in a suit in which the Justice Department is a named defendant." *Id.* ¶ 20; *see also id.* ¶ 21 (listing OLC's current litigations with court-ordered deadlines by the end of July). Furthermore, in this case, the documents gathered in response to Plaintiffs' FOIA request are sensitive and complex and require careful review and inter-agency coordination. *Id.* ¶ 24.

B. Plaintiffs' Proposed Schedule Is Not Practicable

Plaintiffs' request that OLC complete processing and production by June 15, 2018, 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").

OLC has presented "credible evidence" that attempting to comply with Plaintiffs' proposed schedule would interfere with the ability of its FOIA staff to meet their competing obligations. OLC must produce documents in five litigations by the end of July, four of which have initial deadlines before June 15, 2018. *See* Colborn Decl. ¶ 21. As a result, processing and producing documents in this case would increase the number of OLC's court-ordered production deadlines by 20%.

C. The Court Should Grant Defendants Additional Time to Process

The Court should "allow the agency additional time to complete its review of the records," because OLC faces "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, OLC has shown each factor that led to a finding of "exceptional circumstances" in *Daily Caller*. First, OLC has experienced a more than 100% increase in FOIA requests over the past year. Colborn Decl. ¶¶ 10-11. Second, OLC is currently engaged in extensive litigation, particularly considering the size of the component. *Id.* ¶¶ 19-21. Third, such increased litigation has strained the agencies' resources, and Plaintiffs' proposed schedule would compound that strain. *Id.* ¶ 9. Finally, despite the burdens it currently faces, OLC has nevertheless managed to

contain its backlog. *Id*. ¶ 10 (despite receiving 86-130 FOIA requests a year, containing most recent year-end backlog to 60).

For the reasons set forth above, OLC respectfully requests that the Court enter a schedule that requires OLC to complete production within the next 60 days. We thank the Court for considering this request.

Respectfully,

GEOFFREY S. BERMAN
United States Attorney

By: */s/ Ellen Blain*

ELLEN BLAIN
Assistant United States Attorney
86 Chambers Street, 3rd Floor
New York, NY 10007
Tel: (212) 637-2743
Email: ellen.blain@usdoj.gov