

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS, <i>et al.</i> ,)	Case No. 1:17-cv-002768
)	
Plaintiffs,)	Judge Robert M. Dow Jr.
)	
v.)	
)	
U.S. DEPARTMENT OF HOMELAND SECURITY and U.S. CUSTOMS AND BORDER PROTECTION,)	
)	
Defendants.)	

**PLAINTIFFS' REPLY IN SUPPORT OF
MOTION TO SET PRODUCTION SCHEDULE**

Defendants yet again offer layers of excuses that only serve to cloud the key issue at stake in Plaintiffs' Motion to Set Production Schedule: that Plaintiffs and the public after nine months of waiting *still do not have* responsive records relating to a societal issue of the utmost importance and urgency. Defendants received Plaintiffs' FOIA Request on February 2, 2017. (ECF No. 1 at Exhibit A.) As the Court has recognized, the value to the public of those records is inseparable from their timely release and is jeopardized as more and more time passes. *See* Nov. 6, 2017 Hearing Tr. at 7:14-17, attached to Resp. Mem. as Exhibit 1 (ECF No. 69-1) (interest in "timeless is increased" when "live issues" of public importance, like those here, are at issue).

Despite the importance of timely response to this particular FOIA Request, Defendants were silent. It was not until Plaintiffs filed this action on April 12, 2017 that Defendants were forced to respond — which they did over one month later, on May 26, 2017. *See* May 26, 2017 Letter, attached to Opening Mem. as Exhibit 1. That was nearly four months after Defendants received Plaintiffs' FOIA Request for urgently important information.

In their May 26 letter, Defendants granted Plaintiffs' request to expedite.¹ *Id.* Yet by September, Defendants still had not produced a single responsive record, necessitating Plaintiffs' filing of this Motion to Set Production Schedule. Only after this Motion was on file, and the Court subsequently imposed weekly meet and confers and set a deadline of October 20, 2017 for the parties to update the Court on the progress of record production, (ECF No. 59), did Defendants even *begin* the process of setting up a platform through which records could be searched and reviewed. (Joint Status Report, ECF No. 65, at 5.)

An undeniable theme has emerged since Defendants received the FOIA Request in February: time and again, they fail to take any meaningful step towards responding to Plaintiffs' FOIA Request until pushed to do so by the possibility of judicially-imposed consequences. In the court-ordered Joint Status Report, Defendants at last proposed a production schedule — spanning an incredible *27 months*, for the relatively modest 1,820 records they identified from four prioritized custodians. (Joint Status Report, ECF No. 65, at 8.) As this Court pointed out, that boils down to 3.4 documents per day. *See* Nov. 6, 2017 Hearing Tr. at 5:15, attached to Resp. Mem. as Exhibit 1 (ECF No. 69-1). Factoring in the nine months since Defendants received Plaintiffs' FOIA request, Defendants propose *three years* to produce records that the public should have seen months ago. On its face, Defendants' proposal is not reasonable.

Notably, Defendants in their response do not offer a new, reasonable production schedule for the 1,820 prioritized records in this case, even in the face of the Court's admonishment. *See*

¹ The May 26 letter also informed Plaintiffs of Defendants' decision to consolidate Plaintiffs' FOIA Request for processing with other non-overlapping FOIA Requests. Defendants contend that Plaintiffs no longer challenge the decision to conduct a coordinated search for records. Resp. Mem. at 6 n. 4. That does not accurately describe Plaintiffs' position, nor what Plaintiffs represented at the hearing. Plaintiffs have consistently objected to Defendants' decision to aggregate 18 FOIA requests, because that decision has only contributed to the prolonged and unacceptable delay here. Plaintiffs also agree with the Court that Defendants' continued aggregation method is not supported by their claims of efficacy, since the prioritized records have already been collected and de-duplicated. *See* Nov. 6, 2017 Hearing Tr. at 11:20-21, attached to Resp. Mem. as Exhibit 1 (ECF No. 69-1) (“[I]f you’ve done all those steps already, that’s great. That cannot explain 27 months forward, though.”).

Nov. 6, 2017 Hearing Tr. at 4:14-18; 5:22-24, attached to Resp. Mem. as Exhibit 1 (ECF No. 69-1) (“[Mr. Patil:] So our position is that the agency should be allowed to continue to process these requests as a whole and will commit to processing on average per month [] 3575 pages per month. THE COURT: All right. That does not seem reasonable to me. . . . So we’re going to have to come up with another plan.”); *id.* at 7:8-13; 21-25 (“[E]ven if I were looking at this across the country based on the issues involved, I wouldn’t be comfortable with the timeframe that’s proposed. I think it is [] to me a question of whether it passes the straight-face test to say, 27 months on a FOIA return. I mean [] especially in an issue like this. . . . If the plaintiffs were here saying, we want all these documents top down to be complete now, I’d have a different view. But they’re focused on four custodians for now. So that I will tell you in your pleading, that’s what I would be focusing on.”).

It is therefore evident that this Court’s guidance is necessary to prevent further delays and to set a reasonable schedule for the production of records responsive to Plaintiffs’ FOIA Request. To date, two courts have recognized as much and granted the relief that Plaintiffs seek here. *See* October 20, 2017 Order, *ACLU of Washington, et al., v. U.S. Dep’t of Homeland Sec., et al.*, No. C17-00562-MJP (ECF No. 36); September 7, 2017 Order Regarding production and Setting of Dates, *ACLU of Michigan v. U.S. Dep’t of Homeland Sec. and U.S. Customs and Border Protection*, No. 5:17-cv-11149 (ECF No. 35), attached to Opening Mem. as Exhibit 2. This Court should, respectfully, do the same.

For the reasons set forth above, Plaintiff respectfully requests this Court to issue an order setting a schedule for the production of records responsive to Plaintiff’s February 2, 2017 FOIA Request.

DATED this 13th day of November, 2017.

Respectfully submitted,

/s/ Natalie J. Spears

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CERTIFICATE OF SERVICE

I hereby certify that on November 13th, 2017, I electronically filed the foregoing **REPLY IN SUPPORT OF MOTION TO SET PRODUCTION SCHEDULE** with the Clerk of the Court using the ECF system which will send notification of such filing to all attorneys of record.

/s/ Natalie J. Spears