

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

AMERICAN CIVIL LIBERTIES UNION)	
OF MAINE, et al.,)	
)	
Plaintiffs,)	
)	Case No. 2:17-cv-00132-GZS
v.)	
)	
U.S. CUSTOMS AND BORDER)	
PROTECTION, et al.,)	
)	
Defendants.)	

**PLAINTIFFS’ OPPOSITION TO DEFENDANTS’ MOTION TO STAY
PROCEEDINGS PENDING DECISION ON MOTION TO TRANSFER**

The Plaintiffs, which consist of American Civil Liberties Union membership organizations located in the northeast United States, filed the present action against Defendants United States Customs and Border Protection (‘‘CBP’’) and Department of Homeland Security (‘‘DHS’’) in April of 2017. The action seeks compliance with the Freedom of Information Act (‘‘FOIA’’) and production of documents in connection with the CBP Boston Field Office’s implementation of two Executive Orders purporting to ban individuals from seven Muslim countries from entering the United States.

The Defendants have moved to stay the pending action exclusively on the grounds that they have asked the Judicial Panel on Multidistrict Litigation (‘‘JPML’’) to transfer this case. This basis is insufficient to sustain the heavy burden that must be shouldered

by proponents of stays, however. The prejudice suffered by the Plaintiffs in further delaying access to documents to which the public unquestionably has a right to review far outweighs any hardship to the Defendants, much of which is self-imposed. Further, the Defendants have not articulated any basis upon which a stay in this matter promotes judicial economy. This Court should therefore deny the Defendants' Motion to Stay.

FACTUAL BACKGROUND

Earlier this year, President Trump signed two Executive Orders halting refugee admissions and barring entrants from seven predominantly Muslim countries from entering the United States. Compl. ¶¶ 2, 4 & Ex. A. The first order, executed on January 27, 2017, was entitled "Protecting the Nation From Foreign Terrorist Entry Into the United States" ("Executive Order No. 1"). Compl. ¶ 2. The second Executive Order was identically titled but executed on March 6, 2017 ("Executive Order No. 2"). *Id.*

Implementation of the Executive Orders was "chaotic" and "total[ly] lack[ing in] . . . clarity and direction." *Id.* ¶ 7. In the three days that followed execution of Executive Order No. 1, at least five lawsuits resulted in emergency court orders enjoining implementation of various of its sections. *Id.* ¶ 6. Similarly, a district court enjoined implementation of Sections 2 and 6 of Executive Order No. 2 on March 15, 2017. *Id.*

DHS, itself, was confused regarding implementation of the Executive Orders. *Id.* ¶ 8. For example, on January 28, 2017, DHS explained that Executive Order No. 1 would "bar green card holders." *Id.* It reversed itself the next day when DHS Secretary John Kelly clarified that Executive Order No. 1 did not apply to green card holders because "the entry of lawful permanent residents . . . [is] in the national interest." *Id.*

Implementation of the Executive Orders had a detrimental local effect, harming both individuals and institutions at Boston's Logan International Airport. *Id.* ¶ 10. Scholars and academics from Boston-area institutions were denied entry into the United States. *Id.* Even worse, doctors from New England hospitals and patients seeking medical care were delayed, denied entry, or subjected to unnecessary anguish. *Id.*

On February 2, 2017, Plaintiffs submitted a FOIA request to CBP's Boston Field Office and its FOIA Officer at CBP Headquarters. *Id.* ¶ 19. The Request sought records related to CBP's local interpretation and enforcement at ports of entry within the Boston Field Office's jurisdiction, including (a) Bradley International Airport in Connecticut, Bangor International Airport in Maine, Logan International Airport in Massachusetts, Manchester International Airport in New Hampshire, T.F. Green Airport in Rhode Island, and Burlington International Airport in Vermont; and (b) certain port of entry offices including Hartford, Bangor, Boston, Manchester, Providence and Burlington. *Id.* ¶ 20. Importantly, Plaintiffs' FOIA Request did not seek information held in the records at CBP Headquarters. *Id.* & Ex. A. Instead, the Request made clear that the Plaintiffs were seeking "information regarding CBP's **local implementation** of the Executive Order at international airports within the purview of the Boston Field Office," and **not information held in the records of CBP Headquarters.** Compl. Ex. A at 1, 7. This is because, in part, the approach by CBP officials across the country appeared to differ by location. *Id.* at 4.

Plaintiffs requested expedited processing of the FOIA Request pursuant to 5 U.S.C. § 552(a)(6)(E)(v)(II) on the grounds that there is a "compelling need" for the

records by an organization primarily engaged in disseminating information to inform the public about actual or alleged Federal Government activity. Compl. ¶ 22 & Ex. A at 8-11. Although CBP's Boston Field Office received the Plaintiffs' Request on February 10, 2017,¹ and despite the request for expedited processing, CBP failed to acknowledge receipt of the Request. Compl. ¶¶ 27-28 & Ex. B. To date, CBP still has not indicated whether it will comply with Plaintiffs' Request. Compl. ¶ 29.

Plaintiffs waited more than two months for CBP to comply with the FOIA Request and produce the requested documents. *Id.* ¶¶ 28-29. On April 12, 2017, when it became evident that CBP was not going to comply with its statutory obligations, Plaintiffs filed the pending three-count Complaint, alleging violation of the FOIA for failing to determine whether it will comply with the Plaintiffs' Request within 20 days (Count I), failing to make available the records related to local the Boston Field Office's interpretation and enforcement of the Executive Order (Count II), and failing to determine whether to provide expedited processing and notice of that determination within 10 days after the date of the Request (Count III). *Id.* ¶¶ 29-41.

Rather than producing the requested documents, the Defendants initiated a two-fold response. First, on May 8, 2017, the Defendants responded to the Plaintiffs' Complaint by filing a motion with the JPML, seeking to transfer this action to the District Court for the District of Columbia and consolidate it with other FOIA lawsuits naming DHS and CBP as defendants. Defs.' 5/8/17 Notice of Motion at 1 & Exs. 1-2. Those

¹ CBP's FOIA Officer at CBP Headquarters received the Request three days earlier, on February 7, 2017. Compl. ¶ 27.

cases involve different FOIA requests seeking local records held by local CBP offices, however. Defs.'s 5/8/17 Notice of Motion Ex. 2 at 4. None of those lawsuits involve the records held by the Boston Field Office that are at issue in the action pending before this Court.

Second, on May 11, 2017, the Defendants moved to stay the pending action on the sole ground that it seeks a transfer of the action to the JPML. Defs.'s Motion to Stay at 3. The JPML will not hold argument on Defendants' motion to transfer until at least July 27, 2017, however. *Id.* at 7. At that point, nearly six months will have passed since the date of Plaintiffs' FOIA Request, still without any response from the Defendants to the Plaintiffs' Request itself.

ARGUMENT

Contrary to their argument, the Defendants are not entitled to a stay of proceedings merely because they have filed a motion with the JPML to transfer the matter. Although the decision to grant a stay is within this Court's discretion, it should be mindful that the pendency of a motion to the JPML to transfer an action does not affect or suspend pretrial proceedings or otherwise limit this Court's pretrial jurisdiction. *Witman v. Aetna Health, Inc.*, No. 1:14-cv-00322-JAW, 2015 WL 4772666, at **1-2 (D. Me. Sept. 24, 2014); *see also* J.P.M.L. R. 2.1(d).² Courts therefore should not automatically stay

² Rule 2.1(d) of the Rules of the Judicial Panel on Multidistrict Litigation provides:

The pendency of a motion, order to show cause, conditional transfer order or conditional remand order before the Panel concerning transfer or remand of an action pursuant to 28 U.S.C. § 1407 does not affect or suspend orders and pretrial proceedings in the district court in which the action is pending and does not in any way limit the pretrial jurisdiction of the court.

J.P.M.L. R. 2.1(d).

discovery, postpone rulings on pending motions, or generally suspend further rulings upon a [party's] motion to the [JPLM] for transfer and consolidation. *Rivers v. Walt Disney Co.*, 980 F. Supp. 1358, 1360 (C.D. Cal. 1997).

This Court conducts a case-specific inquiry to determine whether a stay is warranted. *Cousins v. Walmart Stores Inc.*, No. 1:15-00318-DBH, 2015 WL 10487975, at *1 (D. Me. Sept. 14, 2015) (citing *Microfinancial, Inc. v. Premier Holidays Int'l, Inc.*, 385 F.3d 72, 77 (1st Cir. 2004)). In doing so, three factors are of primary importance: (1) potential prejudice to the non-moving party; (2) hardship and inequity to the moving party without a stay; and, (3) judicial economy. *Good v. Altria Grp., Inc.*, 624 F. Supp. 2d 132, 134 (D. Me. 2009). The Defendants bear a "heavy burden" to prevail on a motion to stay. *Microfinancial, Inc. v. Premier Holidays Int'l, Inc.*, 385 F.3d 72, 77 (1st Cir. 2004). Because the Defendants have failed to sustain their burden on all three factors, this Court should deny the Motion to Stay.

A. A stay of the pending action will perpetuate the prejudice already suffered by the Plaintiffs.

FOIA operates to expose a federal agency's functions to public scrutiny, thereby furthering the right of citizens to know and understand "what their government is up to" and promoting an "informed citizenry." *Carpenter v. U.S. Dep't of Justice*, 470 F.2d 434, 437 (1st Cir. 2006) (internal quotations and citations omitted). *See also Union Leader Corp. v. U.S. Dep't of Homeland Sec.*, 749 F.3d 45, 49 (1st Cir. 2014) (explaining that FOIA's policy of full agency disclosure furthers the statute's purpose of permitting citizens to "know what their government is up to"); *Providence Journal Co. v. U.S. Dep't*

of the Army, 981 F.2d 552, 556 (1st Cir. 1992) (noting that FOIA seeks to prevent the development and application of a body of "secret law"). "Indeed, the core purpose of the FOIA . . . is to ensure that government activities are open to public scrutiny." *Carpenter*, 470 F.3d at 441 (quoting *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 774 (1989)).

In light of this core purpose, it is both important and statutorily required that a governmental agency makes records responsive to a FOIA request promptly available. *See id.* at 438; 5 U.S.C. § 552(a)(3). Federal agencies are obligated to respond to a FOIA request within 20 days, absent "unusual" or "exceptional" circumstances. 5 U.S.C. § 552(a)(6)(A)(i). Additionally, a requestor has a statutory right to expedited processing where there is an "urgency to inform the public concerning actual or alleged Federal Government activity." *Id.* § 552(a)(6)(E)(i). Under such circumstances, an agency must process a FOIA request "as soon as practicable." *Id.* § 552(a)(6)(E)(iii). Although the meaning of this phrase may vary depending upon the specific facts of the case, courts have generally found that one to two months is more than sufficient for a federal agency to respond to an expedited FOIA request, even in the face of requests allegedly involving national security concerns or classified material. *Elec. Privacy Info. Ctr. v. Dep't of Justice*, 416 F. Supp. 2d 30, 40 (D. Col. 2006) (collecting cases).

To date, Plaintiffs' FOIA Request has been pending nearly four months. Based upon the Defendants' expressed concern in the Motion to Stay that this Court might "set a schedule" to govern CBP's search for and release of records, Defendants' Motion to Stay at 5, it is clear that Defendants have not yet commenced any process to respond to the

Plaintiffs' Request. Instead, the Defendants' Motion to Stay is part and parcel of a continued attempt to delay responding to Plaintiffs' Request and flies in the face of FOIA's purpose and Plaintiffs' statutory right to expedited processing.

The Executive Orders have not only been the subject of significant national debate, the Boston Field Office's implementation was subject to litigation and large-scale public protests.³ In light of the intense public scrutiny, there can be no question that there is an urgency to inform the public through the release of responsive records. Despite the overwhelming public interest in the Defendants' operations and implementation of the Executive Orders, the Defendants continue to drag their feet and restrict the public's right to know. This undermines the informed citizenry, which is vital to democracy. *Carpenter*, 470 F.3d at 437. Plaintiffs therefore will continue to suffer significant prejudice if the action is stayed.

B. Defendants have not sustained their burden of establishing a clear case of hardship.

The second factor this Court must consider in analyzing a motion to stay is the potential hardship to the moving party in the absence of a stay. *Good*, 624 F. Supp. 2d at 134. In order to sustain their burden, the Defendants must establish "a clear case of hardship." *Microfinacial, Inc.*, 385 F.3d at 77. The Defendants have failed to identify

³ See, e.g., John Hiliard and Nicole Dungca, *Iranian Woman Held at Logan Airport For Several Hours*, BOSTON GLOBE, Jan. 29, 2017, avail. at <https://www.bostonglobe.com/metro/2017/01/29/logancolor/nSABR3UoOQNMDh3BGcZosI/story.html>; Mark Arsenault, *Thousands in Copley Square protest immigration order*, BOSTON GLOBE, Jan. 29, 2017, avail. at <https://www.bostonglobe.com/metro/2017/01/29/protest/5zOAYFudUwDp8TF4ZnYs5O/story.html>.

any real hardship, let alone a "clear case" sufficient to support the grant of a stay in this matter.

Defendants argue that "moving forward *could* . . . result in rulings on pretrial issues that conflict with those of other districts or of the transferee court" in the event the JPML grants the motion to transfer. Defs.'s Motion to Stay at 7 (emphasis added). This argument does not contain specificity regarding what pretrial rulings in this case might conflict with other districts, nor could it as there are no motions pending other than the instant Motion to Stay. Further, the Defendants must answer the complaint regardless of whether the matter is transferred by the JPML. *See Guerro v. Target Corp.*, No. 12-21115-CIV, 2012 WL 2054863, at *1 (S.D. Fla. June 7, 2012). *See also Barber v. BP, PLC*, No. 10-0263-WS-B, 2010 WL 2266760, at *2 (S.D. Ala. June 4, 2010) (denying motion to stay because "there is no reason in the world why defendants cannot file responsive pleadings prior to the MDL's determination on the pending transfer and consolidation issues").

Although the Defendants point to an alleged duplication of work associated with the actual production of documents as evidence of possible hardship, Defs.'s Motion to Stay at 7, there is no explanation, for example, how responding to a FOIA request regarding Boston Field Office implementation of the Executive Orders duplicates efforts in responding to a request regarding the Miami Field Office's implementation of the Executive Orders. Further, to the extent the Defendants are relying upon a claim of duplication to support their argument that they will suffer clear hardship, such hardship

appears to be self-imposed in light of the CBP's decision to internally coordinate responses through CBP Headquarters rather than the relevant Field Offices.

C. A stay will not positively impact judicial economy.

Defendants advance several arguments in support of their claim that judicial economy supports a stay of the pending action. Defendants argue that courts "typically" grant stays pending motions to transfer to the JPML. As explained above, however, courts do not automatically grant a stay merely because a party has requested a transfer to the JPML. *See Rivers*, 980 F. Supp. at 1360. In fact, courts have denied motions to stay in circumstances similar to those presented in this matter. *See, e.g., Sehler v. Prospect Mortg., LLC*, No. 1:13cv473(JCC/TRJ), 2013 WL 5184216, at *3 (E.D. Va. Sept. 16, 2013); *Guerro*, 2012 WL 2054863, at *1; *Sullivan v. Cottrell, Inc.*, No. 11CV1076S, 2012 WL 694825, at *4 (W.D.N.Y. Feb. 29, 2012); *St. Joe Co. v. Transocean Offshore Deepwater Drilling Inc.*, 774 F. Supp. 2d 596, 601 (D. Del. 2011); *Barber*, 2010 WL 2266760, at *2.

Moreover, consolidation of FOIA actions is extremely rare. In the Memorandum in Support of Defendants' Motion for Transfer, Defendants cite to only two cases in which the JPML has consolidated FOIA actions: *In re Church of Scientology Flag Serv. Org./IRS FOIA Litig.*, No. 892 (J.P.M.L. Sept. 4, 1991) ("Church of Scientology"), and *In re Freedom Magazine/IRS FOIA Litig.*, No. 910 (J.P.M.L. Feb. 12, 1992) ("Freedom Magazine"). Defs.' 5/8/17 Notice of Motion to Transfer, Ex. 2 at 2. Both cases are factually distinguishable, highlighting that the underlying purpose of the Defendants'

Motion to Stay is not to promote judicial economy but instead to delay responding to Plaintiffs' FOIA Request.

In *Church of Scientology*, all of the FOIA requests were made upon the same IRS office in Jacksonville, Florida. *Church of Scientology* at 2. Here, however, the relevant FOIA requests were made upon the different CBP field offices governing local implementation of the Executives Orders. In *Freedom Magazine*, the selected transferee forum was the IRS national office because one of the constituent actions sought IRS records located at that office. *Freedom Magazine* at 2. Here, however, not a single FOIA request seeks documents located in the Defendants' proposed transferee forum, the District of Columbia, and, in fact, all requests specifically disclaim any request for documents located in the District of Columbia.

Defendants also argue that a stay promotes judicial economy because CBP Headquarters is coordinating the agency's search for records. Defs.' Motion to Stay at 5. Whether CBP is internally coordinating a response to various requests for local records has nothing to do with judicial economy. One might even question whether such coordination positively impacts CBP's internal efficiency, considering that the Plaintiffs' Request seeks local records related to the Boston Field Office's implementation of the Executive Orders and the other requests at issue similarly seek local records. Regardless of CBP's internal procedures, the relevant question in this action is whether the Boston Field Office conducted the search required by FOIA. Adding an unnecessary layer of bureaucracy within the CBP in order to support its argument that transfer to the JPML is appropriate has no relation to this or any court's efficient functioning.

CONCLUSION

The Defendants have failed to sustain their heavy burden to support a stay, which is particularly evident when the lack of articulated hardship is balanced against the significant prejudice that the Plaintiffs will continue to suffer in the event this matter is further delayed. In light of the foregoing, therefore, the Plaintiffs respectfully request that this Court deny the Defendants' Motion to Stay Proceedings Pending Decision on Motion to Transfer.

Dated: May 31, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2017, I electronically filed Plaintiffs' Opposition to Defendants' Motion to Stay Proceedings Pending Decision on Motion to Transfer with the Clerk of Court using the CM/ECF system, which will send notification of such filing to counsel of record for all parties.

Dated: May 31, 2017

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