

No. 13769, 82 Fed. Reg. 8977 (Feb. 1, 2017) (“Executive Order No. 1”), as well as any other judicial order or executive directive issued regarding Executive Order No. 1, including President Trump’s March 6, 2017 Executive Order, identically titled, Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 6, 2017) (“Executive Order No. 2) (collectively, the “Executive Orders”). The Request explicitly sought records from sites within the purview of the CBP’s Baltimore Field Office. These sites include Washington Dulles Washington Dulles International Airport, Baltimore Washington International Airport, Philadelphia International Airport, and Pittsburgh International Airport (“Local International Airports”) and Baltimore, Philadelphia, Pittsburgh, Port of Washington-Dulles and Wilmington (“Port of Entry Offices”).

Defendants filed a motion to transfer with the Judicial Panel on Multidistrict Litigation (“JPML”) and obtained a stay of this proceeding pending resolution of that motion. D.E. 36. Defendants’ efforts were unsuccessful, as the JPML denied Defendants’ transfer motion. D.E. 37.

Defendants have had Plaintiffs’ Request since February 2 and have had the Complaint in this matter since April 12. Yet, Defendants have yet to produce substantively responsive documents. While Defendants have made small initial releases of records, those records were not responsive to Plaintiffs’ Request, as the records appear to have been produced from CBP’s headquarters, rather than from the *local sites* within the purview of the CBP’s Baltimore Field Office (“Local Sites”), as explicitly sought in the Request.

Plaintiffs understand that Defendants have begun the effort to search for responsive records relating to the Local Sites, but Defendants have yet to advise Plaintiffs when they expect to produce those records. Plaintiffs further understand that Defendants have not applied search terms requested by Plaintiffs, are not searching files proposed by Plaintiffs, and are not searching for records from all appropriate custodians.

Defendants' continued protestations about their inability to timely produce records responsive to Plaintiffs' Request stands against the fact that the Request was served on February 2 – more than eight months ago. Defendants have had a substantial amount of time in which to search for and produce responsive records. Further delays should not be countenanced.

Plaintiffs continue to believe that Defendants should be required to meet the January 12, 2018 deadline set forth in the Court's August 31, 2017 Order (D.E. #40). While that deadline is for the completion of fact discovery, it similarly should be the deadline for the completion of Defendants' production of *all* records responsive to Plaintiffs' Request.

Accordingly, Plaintiffs believe the Court should set deadlines for Defendants' production of responsive records, a *Vaughn* index, and a privilege log. Additionally, should the parties fail to reach agreement regarding the issues noted above – the application of certain search terms, the search for certain files, and the search for records from all appropriate custodians – Plaintiff will seek appropriate discovery about the sufficiency (or lack thereof) of Defendants search for and production of responsive documents.

Plaintiffs look forward to receiving from Defendants “a processing and production schedule in two weeks,” as promised by Defendants below. Plaintiffs anticipate addressing the propriety of that schedule in the next Joint Status Report and the Scheduling Conference.

2. DEFENDANTS' POSITION

The FOIA Request at issue is attached to Plaintiffs' Complaint and speaks for itself. Defendants are processing Plaintiffs' Request as quickly as practicable and have begun making releases of records responsive to Plaintiffs' Request on a rolling basis, including three releases on July 14, 2017, July 26, 2017, and September 21, 2017 (“Interim Releases”). Defendants' Interim Releases focus primarily on information responsive to parts 2 through 4 of the Request, which seek certain numerical data, and parts 1(b) and 5 of the Request, which seek “‘guidance’ that was

‘provided to DHS field personnel shortly’ after President Trump signed [Executive Order No. 1].” Additionally, some of the material in Defendants’ Interim Releases consisted of email exchanges between personnel at CBP’s headquarters and personnel in CBP field offices across the country, including personnel in CBP’s Baltimore Field Office.

These communications between personnel at CBP headquarters and personnel in the field offices are responsive to Plaintiffs’ Request. Though Plaintiffs’ Request seeks records “held” locally and disclaims records “held” at headquarters, this distinction is nonexistent in the context of electronic documents. By their nature, electronic communications between personnel at headquarters and personnel in the Baltimore Field Office are “held” both locally and at headquarters. While the copy of the email that the agency produced happens to be the copy that was located in the files of the custodian at CBP headquarters, that copy is identical to the copy that would be located in the files of the custodians at CBP field offices across the country.¹

As Defendants previously explained, the agency has gathered over 8,600 potentially responsive email messages and attachments (“email records”), totaling over 23,700 pages², from six custodians for the time period from January 27 through February 4, 2017 by searching for all email messages to or from these custodians during that period. The six custodians are the Director of Field Operations for the Baltimore Field Office, the Assistant Director of Field Operations for

¹ For example, many emails already released by the agency consist of communications sent from personnel at CBP headquarters to the directors of field operations in all 20 field offices throughout the country. Plaintiffs’ suggestion that an email is only responsive if produced from a “local” field office custodian would mean that a single such email would need to be produced from the Baltimore Director of Field Operations in this case; from the Detroit Director of Field Operations in the related case in the Eastern District of Michigan; from the Chicago Director of Field Operations in the related case in the Northern District of Illinois; and so on for all field offices covered by the ACLU affiliate requests. That outcome would only delay the release of records and unnecessarily burden the agency, and is inconsistent with the purposes and requirements of the FOIA.

² This total page count does not include spreadsheets attached to email messages, as it is difficult to translate spreadsheets into pages.

the Baltimore Field Office, the Port Director for Baltimore-Washington International Airport, the Port Director for Philadelphia International Airport, the Port Director for Pittsburgh International Airport, and the Port Director for Washington Dulles International Airport. The agency identified these custodians as those most likely to possess email records responsive to the Request as the agency understands it.

Defendants also note that the CBP FOIA Office has received nearly 100 requests for information pertaining to Executive Order 13,769, and 21 of those requests are in litigation in district courts around the country. Nineteen of these requests were submitted by ACLU affiliates, and 15 of these requests are in litigation in thirteen cases brought by the requesting ACLU affiliate(s). For each of the 19 ACLU requests seeking records from CBP field offices, the agency identified the local custodians most likely to possess email records responsive to each respective request. Nationwide, the agency has identified 84 field office custodians across all 19 ACLU field office requests, in addition to the headquarters custodians whose records the agency is searching in connection with another ACLU request and other non-ACLU FOIA requests. From these 84 custodians, the agency gathered over 100,000 potentially responsive email records for the time period from January 27 through February 4, 2017 by searching for all email messages to or from those custodians during that period. These email records total approximately 275,000 pages of potentially responsive records for the agency to search and review. This total page count does not include several thousand spreadsheets attached to email messages, for the reason stated *supra* n.1.

In processing Plaintiffs' request and the requests of other ACLU entities, as well as some of the others of the nearly 100 requests for information pertaining to Executive Order 13,769 that seek overlapping information, some coordination of the processing is equitable and fair to all of the requests. Further, such coordination will yield economies of scale in processing and review

that will increase the efficiency and speed of the agency's processing and response times. For example, coordinating review for the 19 ACLU field office requests would allow streamlined review of similar documents located across the field offices. It would also allow de-duplication of identical documents located in multiple field offices that cannot be achieved when searches are conducted separately by field office.

Plaintiffs in this case and the plaintiffs in some of the other cases brought by ACLU affiliates have proposed search terms for the agency to apply to these email records. Applying these proposed search terms has not significantly reduced the page count of the universe of potentially responsive email records. In the last couple of weeks, Defendants have been analyzing the proposed search terms to identify a set of search terms that is reasonably calculated to identify responsive records, and intends to complete this analysis and reach out to Plaintiffs about search terms later this week.

The agency is also searching for non-email records but intends to prioritize processing of email records. The agency intends to assess whether additional searches are warranted based in part on its review of the records located in its initial searches, and Defendants are open to continuing discussions with Plaintiffs regarding the scope of the agency's search.

Given the immense volume of potentially responsive records for review, Defendants cannot at this time provide a schedule for completion of processing these email records, although Defendants intend to continue making rolling interim releases of responsive records to Plaintiffs. Defendants note, however, that completing the processing of what is likely to be upwards of 200,000 pages of email records by January 12, 2018, as Plaintiffs suggest should be required, is both unlikely and inequitable in light of the agency's FOIA obligations and resources. Moreover, until processing is complete, it would be premature to set a deadline for Defendants' production

of a *Vaughn* index.³ Defendants anticipate that they will be in a better position to discuss a processing and production schedule in two weeks, after they have completed the analysis of the proposed search terms, conferred with Plaintiffs about the search terms, and applied a reasonable set of search terms to the email records to ascertain the total number of pages requiring review and processing.

In response to Plaintiffs' suggestion that they may seek discovery about Defendants' search for and processing of responsive records, Defendants reiterate that discovery is generally unavailable to plaintiffs in FOIA actions. The adequacy of an agency's search for records responsive to a FOIA request and the appropriateness of an agency's decision to withhold information are ordinarily determined on the basis of declarations supplied by the agency at the summary judgment stage, which the court may direct the agency to supplement with additional information if the court finds that the agency's initial submissions do not establish the agency's compliance with the FOIA.

³ Plaintiffs also state that they "believe the Court should set [a] deadline[] for Defendants' production of . . . a privilege log." See Pls.' Position, *supra* at 3. A separate privilege log is generally not produced in a FOIA case; rather, information regarding the agency's privilege assertions and other statutory withholdings is provided in the agency's declaration and *Vaughn* index. As the D.C. Circuit, which handles the appeals from a significant portion of the nation's FOIA actions and is widely recognized for its expertise in the subject matter, has explained regarding an agency's obligations in a FOIA case:

In a *Vaughn* index, an agency "indicates in some descriptive way which documents the agency is withholding and which FOIA exemptions it believes apply." *American Civil Liberties Union v. CIA*, 710 F.3d 422, 432 (D.C. Cir. 2013). The name comes from *Vaughn v. Rosen*, which first established the process by which an agency may discharge its burden to justify withholding information under FOIA exemptions. See 484 F.2d 820, 826–828 (D.C. Cir. 1973). Although agencies frequently rely on *Vaughn* indices, "[t]he materials provided by the agency may take any form so long as they give the reviewing court a reasonable basis to evaluate the claim of privilege." *American Civil Liberties Union*, 710 F.3d at 433 (quoting *Gallant v. NLRB*, 26 F.3d 168, 173 (D.C. Cir. 1994)).

DiBacco v. U.S. Army, 795 F.3d 178, 186 n.2 (D.C. Cir. 2015).

DATED this 4th day of October, 2017.

Respectfully submitted,

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