

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
MAKE THE ROAD NEW YORK AND MAKE THE
ROAD CONNECTICUT,

Plaintiffs,

-against-

U.S. DEPARTMENT OF HOMELAND SECURITY et al.,

Defendants.

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NICHOLAS G. GARAUFIS, United States District Judge.

MEMORANDUM & ORDER

18-CV-2445 (NGG) (JO)

Plaintiffs Make the Road New York and Make the Road Connecticut are challenging the responses of Defendants U.S. Department of Homeland Security (“DHS”); the Office of the Secretary of Homeland Security; U.S. Citizenship and Immigration Services (“USCIS”); the U.S. Department of Justice (“DOJ”) and its Civil Division (“DOJ-CIV”); the Office of the Attorney General (“OAG”); the Office of the Solicitor General (“OSG”); and the Office of Legal Counsel (“OLC”) to requests Plaintiffs submitted under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, for records relating to the decision to terminate the Deferred Action for Childhood Arrivals (“DACA”) program. (Am. Compl. (Dkt. 21).) Before the court is Plaintiffs’ motion for a global scheduling order that would include deadlines by which Defendants would have to produce all remaining responsive documents as well as a Vaughn index and file for summary judgment. (Pls. Mot. for Global Scheduling Order (“Pls. Mot.”) (Dkt. 33).) Defendants contend that such an order is unwarranted and ask that, if the court does decide that a global scheduling order is necessary, establish more forgiving deadlines than the ones Plaintiffs propose. (Defs. Opp’n to Pls. Mot. (“Defs. Opp’n”) (Dkt. 34).) For the following reasons, Plaintiff’s motion for a scheduling order is GRANTED IN PART.

I. BACKGROUND

On September 22, 2017, Plaintiffs submitted identical FOIA requests to multiple federal agencies and entities, including Defendants. (Pls. FOIA Reqs. (Dkt. 21-1).) These FOIA Requests seek information about (among other things): how and why the decision to terminate DACA was made; how the government implemented the “wind-down” of the DACA program; and government communications with state attorneys general about litigation regarding the Deferred Action for Parents of Americans and Lawful Permanent Residents program (“DAPA”).¹ (*Id.* at 3-6.) Plaintiffs sought expedited processing of their FOIA requests pursuant to 5 U.S.C. § 552(a)(6)(E) and a waiver of any fees pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). (*Id.* at 6-9.) DHS granted expedited processing on September 25, 2017 (DHS Acknowledgement (Dkt. 21-2) at ECF p.4; Am. Compl. ¶ 71); DOJ Office of Information Policy (“OIP”) granted expedited processing on behalf of DOJ² and OAG on or around October 2, 2017³ (OIP Acknowledgement (Dkt. 21-7) at 1; Am. Compl. ¶ 87); and OSG granted expedited processing after an administrative appeal (Am. Compl. ¶ 99). USCIS allegedly did not respond to Plaintiffs’ request for expedited processing. (Am. Compl. ¶ 81.) OSG and OLC denied expedited processing. (*See* Am. Compl. ¶¶ 97

On April 25, 2018, Plaintiffs brought this action. (Compl. (Dkt. 1).) Plaintiffs subsequently amended their complaint to reflect that they had filed a supplemental FOIA request to the DOJ and DOJ-CIV (Am. Compl.), and Defendants answered on July 16, 2018 (Answer (Dkt. 27).) In their amended complaint, Plaintiffs raise four claims:

¹ Plaintiffs later filed a supplemental FOIA request to the DOJ on June 8, 2018, as to certain communications regarding DACA litigation. (*See* Am. Compl. ¶ 119; Joint Status Report (Dkt. 28) at 1.)

² It is not clear to the court whether OIP’s grant of expedited processing applies to DOJ-CIV as well.

³ OIP’s letter purports to have been drafted on August 18, 2017. (OIP Acknowledgement (Dkt. 21-7) at 1.) This appears to have been a mistake, as the letter indicates that OIP did not receive Plaintiff’s FOIA request until September 22, 2017. (*Id.*) Plaintiffs claim to have received OIP’s letter on October 2, 2017. (Am. Compl. ¶ 87.)

1. A FOIA violation for failure to disclose and release records responsive to Plaintiffs' requests, against all Defendants;
2. A FOIA violation for denial of Plaintiffs' request for expedited processing, against USCIS and OLC;
3. A FOIA violation for the alleged constructive denial of Plaintiffs' request for a fee waiver, against USCIS, DOJ, OAG, OSG, and OLC; and
4. A FOIA violation for improper denial of Plaintiffs' request for expedited processing, against DOJ Civil Division.

(Am. Compl. ¶ 125-45.) Plaintiffs ask the court to declare that Defendants violated FOIA and order Defendants to conduct a search of and disclose all records responsive to Plaintiffs' FOIA requests on an expedited basis. (Am. Compl. at p.29.)

Defendants have processed Plaintiffs' FOIA requests at varying speeds. OSG, OLC, and the DOJ Civil Division assert that they have completed production of responsive documents. (See Pls. Mot. at 3.) USCIS has produced 2,576 pages so far and has agreed to process a minimum of 700 pages (of approximately 2800 remaining to review) per month, which puts it on track to complete production by February 28, 2019. (*Id.* at 2-3.) DHS has processed only 259 of a total 9,000 pages to be reviewed, despite having granted expedited processing more than 13 months ago. (*Id.* at 2.) OIP (on behalf of OAG) has no produced no documents to date (*id.* at 3); due to a technical issue, OIP estimates that it will not finish its search for responsive documents until early December, at which point it will know how many pages were yielded by its searches and begin processing documents (Defs. Opp'n at 3).

Plaintiffs have requested a global scheduling order to "facilitate the efficient resolution of this lawsuit." (Pls. Appl. for Status Conference (Dkt. 29) at 2; see Pls. Mot.) In a letter filed on November 5, 2018, Plaintiffs proposed that the court order (1) production of 35 documents that District Judge William Alsup ordered to be released in the similar case of Regents of the

University of California v. U.S. Dep't of Homeland Sec., No. 17-CV-5211 (N.D. Cal.) (the “Alsup documents”) by November 30, 2018; (2) production of all documents on a rolling monthly basis to be completed by February 28, 2019; (3) production of a rolling monthly Vaughn index within two weeks of each production and to be completed by March 14, 2019; and (4) for Defendants to move for summary judgment by March 28, 2019. (Pls. Mot. at 6.)

Defendants maintain that a global scheduling order is unwarranted. (Defs. Opp'n at 1.) They alternatively ask that, if the court does issue a global scheduling order, that it include the following requirements and deadlines: (1) DHS to process a minimum of 300 pages per month, with production completed by than May 31, 2021; (2) USCIS to continue at its current pace of processing a minimum of 700 pages per month, with production completed by no later than February 28, 2019; (3) OIP to update the court with a proposed processing schedule by December 21, 2018, after its search for responsive records is complete; and (4) Defendants to meet and confer with Plaintiffs and submit separately to the court their positions on timing for dispositive motions no later than 30 days after the last defendant completes processing of Plaintiffs' FOIA requests. (Id.) In support of their proposed production deadline for DHS, Defendants have provided a declaration from James V.M.L. Holzer, Deputy Chief FOIA Officer for DHS (“Officer Holzer”), attesting to resource constraints at DHS. (Decl. of James V.M.L. Holzer (“Holzer Decl.”) (Dkt. 34-1).)

II. LEGAL STANDARD

A. Scheduling Orders for Expedited Requests

An agency must process an expedited request “as soon as practicable.” 5 U.S.C. § 552(a)(6)(E)(iii). “[F]ailure by an agency to respond in a timely manner to [an expedited] request [is] subject to judicial review. . . .” Id.

Courts have held that a presumption of agency delay “exists when an agency fails to process an expedited FOIA request within the twenty day time limit applicable to standard FOIA requests.” Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law v. U.S. Dep’t of State, 300 F. Supp. 3d 540, 548-49 (S.D.N.Y. 2018) (alteration adopted) (quoting Elec. Privacy Info. Ctr. v. Dep’t of Justice, 416 F. Supp. 2d 30, 39 (D.D.C. 2006)). “An agency may rebut this ‘presumption of agency delay,’ however, by ‘presenting credible evidence that disclosure within [the twenty day] time period is truly not practicable.’” Id. (alteration adopted) (quoting Elec. Privacy Info. Ctr., 416 F. Supp. 2d at 39); see Wilderness Soc’y v. Dep’t of Interior, No. 04-CV-650 (CKK), 2005 WL 3276256, at *10-11 (D.D.C. Sept. 12, 2005) (collecting cases that hold that an agency must present “analysis, statistics, agency affidavits, declarations, or other sworn statements” to meet its burden of establishing that further time for processing a FOIA request is required).

When imposing production schedules in situations of agency delay, “courts often find that one to two [additional] months is sufficient time for an agency to process broad FOIA requests that may involve classified or exempt material.” Brennan Ctr., 300 F. Supp. 3d at 550 (quoting Elec. Privacy Info. Ctr., 416 F. Supp. 2d 30, 40 (D.D.C. 2006)); ACLU v. Dep’t of Def., 339 F. Supp. 2d 501, 504-05 (S.D.N.Y. 2004) (ordering production of all responsive documents within one month); Judicial Watch, Inc. v. Dep’t of Energy, 191 F. Supp. 2d 138, 140-41 (D.D.C. 2002) (ordering agencies to process over 6000 pages of material in less than 60 days); Nat. Res. Def. Council (“NRDC”) v. Dep’t of Energy, 191 F. Supp. 2d 41, 43 & n.5 (D.D.C. 2002) (ordering the “vast majority” of the processing of 7500 pages to be completed within 32 days).

B. Ordering Vaughn Indices⁴

In addition to ordering expedited production of documents, “[a] court may also order expedited compilation and production of a Vaughn index.” Brennan Ctr., 300 F. Supp. at 547. A Vaughn index identifies documents withheld in part or in full from a FOIA production, describes each document, and states the government’s basis for the withholding. See ACLU v. Dep’t of Justice, 844 F.3d 126, 129 n.4 (2d Cir. 2016); Seife v. U.S. Dep’t of State, 298 F. Supp. 592, 606 (S.D.N.Y. 2018). “The titles and descriptions of documents listed in a Vaughn index usually facilitate the task of asserting and adjudicating the requester’s challenges to the Government’s claims of exemption by giving the court and the challenging party a measure of access without exposing the withheld information.” Seife, 298 F. Supp. at 606-07 (alteration adopted) (internal quotation marks omitted) (quoting N.Y. Times v. U.S. Dep’t of Justice, 758 F.3d 436, 439 (2d Cir.), supplemented, 762 F.3d 233 (2d Cir. 2014)).

Courts sometimes require the production of Vaughn indices prior to the filing of dispositive motions. See Brennan Ctr., 300 F. Supp. at 550 (collecting cases). Vaughn indices are not required, however, where they are not “necessary to restore the traditional adversary process” because the “[FOIA] requester has acquired sufficient facts to permit the adversary process to function”—for example, when an agency has provided information regarding the exemptions it plans to claim. See id. at 550-51 (quoting Providence Journal Co. v. U.S. Dep’t of Army, 769 F. Supp. 67, 69 (D.R.I. 1991)).

⁴ The term is derived from Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973).

III. DISCUSSION

A. Necessity of a Scheduling Order

The court agrees with Plaintiffs that a scheduling order is warranted because of DHS and OAG's woeful tardiness in complying with Plaintiffs' FOIA requests. Officer Holzer has represented that DHS's resource constraints make it difficult for the agency to review more than 300 pages per month (Holzer Decl. ¶ 18); however, that does not explain why, in the 13 months since DHS and OAG granted Plaintiffs' request for expedited processing, DHS has processed a total of 259 pages and OAG has processed zero. (Pls. Mot. at 2-3; Holzer Decl. ¶ 15.)

Defendants have not offered a persuasive justification for this glacial pace and thus have failed to rebut the presumption of agency delay. Cf. Brennan Ctr., 300 F. Supp. 3d at 550 (finding that the State Department did not rebut the presumption of agency delay because it did not explain why it had failed to process the plaintiff's expedited FOIA request for nearly six months). DHS and OAG's lack of progress in the last 13 months make clear that, without a court-imposed schedule, they cannot be expected to produce responsive information in a timely manner, as FOIA requires them to do. Cf. ACLU, 339 F. Supp. 2d at 504 (imposing a schedule on defendant agencies because "the glacial pace at which defendant agencies have been responding to plaintiffs' requests shows an indifference to the commands of FOIA, and fails to afford accountability of government that the act requires").

B. Document Production Deadlines

1. DHS

Defendants have proposed a deadline of May 31, 2021 for DHS to complete production, with DHS processing a minimum of 300 pages per month. (Defs. Opp'n at 1, 3.) This will not do. To allow DHS nearly four years to respond to an expedited FOIA request would "subvert the intent of FOIA." See Brennan Ctr., 300 F. Supp. 3d at 550 (quoting ACLU, 339 F. Supp. 2d at

505). Tellingly, Defendants have not cited a single case in which a court approved of anything approaching such an extreme delay because of a federal agency's resource constraints. On the contrary, courts have often ordered federal agencies faced with expedited requests to process thousands of pages within one to two months. See Order, Nat'l Day Laborer Organizing Network v. U.S. Immigration and Customs Enforcement Agency, No. 10-CV-3488 (SAS) (S.D.N.Y. July 29, 2011) (Dkt. 104) (ordering DHS, ICE, and the FBI to each produce thousands of pages in less than two months); ACLU, 339 F. Supp. 2d at 504-05 (ordering production of all responsive documents within one month); Judicial Watch, Inc., 191 F. Supp. 2d at 140-41 (D.D.C. 2002) (ordering agencies to process over 6000 pages of material in less than 60 days); NRDC, 191 F. Supp. 2d at 43 (D.D.C. 2002) (ordering the "vast majority" of the processing of 7500 pages to be completed within 32 days).

Plaintiffs have proposed a much earlier production deadline for DHS: February 28, 2019, with productions on a rolling monthly basis. (Pls. Mot. at 1.) While the court recognizes that DHS may have difficulty meeting this deadline (see Holzer Decl. ¶¶ 6-19 (attesting to DHS's resource constraints)), the court nonetheless adopts it because it was the only reasonable one proposed and because it still provides DHS with over three months to complete its review. DHS must do its best to meet this deadline. Should DHS find that it is unable, for good and specific reasons, to complete production by February 28, 2019, it must confer with Plaintiffs before requesting an extension from the court. Rolling monthly productions will be taken as evidence of good faith on DHS's part. See ACLU, 339 F. Supp. 2d at 505.

Plaintiffs also ask the court to order DHS to prioritize review of the Alsup documents and produce them (subject to any FOIA exemptions) by November 30, 2018.⁵ (Pls. Mot. at 5-6.) DHS argues that it has discretion regarding the way it conducts its search for records in response to Plaintiffs' FOIA request, and that such discretion extends to the order in which it reviews potentially responsive documents. (Defs. Opp'n at 4 (citing Bigwood v. U.S. Dep't of Def., 132 F. Supp. 3d 124, 140 (D.D.C. 2015).) Additionally, DHS has credibly shown that, due to limitations with its document management software, prioritizing the Alsup documents would create an undue burden on the agency's ability to comply with Plaintiffs' and other FOIA requests. (Id. at 4-5; Holzer Decl. ¶¶ 20-26.) The court thus declines to order DHS to prioritize review and production of the Alsup documents. Cf. Johnson v. Exec. Office for U.S. Attorneys, 310 F.3d 771, 776 (D.C. Cir. 2002) ("FOIA, requiring as it does both systemic and case-specific exercises of discretion and administrative judgment and expertise, is hardly an area in which the court should attempt to [micromanage] the executive branch."); Bigwood, 132 F. Supp. 3d at 140 (explaining that agencies have "discretion in crafting a list of search terms that they believe to be reasonably tailored to uncover documents responsive to the FOIA request" (alteration adopted) (internal quotation marks omitted) (quoting Agility Public Warehousing Co. K.S.C. v. Nat'l Sec. Agency, 113 F. Supp. 3d 313, 339 (D.D.C. 2015))). The previously discussed February 28, 2019 production deadline for DHS applies equally to all documents within the scope of Plaintiff's FOIA request, including the Alsup documents.

⁵ The parties seem to disagree about the volume of the Alsup documents. (Compare Pls. Mot. at 5-6 (stating that there are 35 such documents) with Defs. Opp'n at 4 n.2 (noting that 84 documents were produced in camera to Judge Alsup).)

2. OIP/OAG

Plaintiffs ask that OIP also be required to complete its production on behalf of OAG by February 28, 2019. (Pls. Mot. at 1.) OIP states that it cannot agree to complete processing by a specific date until it completes its search for potentially responsive documents and knows how many documents it must review. (Defs. Opp'n at 3.) Accordingly, OIP asks that it be allowed to complete its search and update the court with a proposed production schedule by no later than December 21, 2018. (Id.) The court adopts OIP's proposal, with the caveat that OIP should confer with Plaintiffs and attempt to agree on a production schedule before proposing one to the court. If Plaintiffs and OIP cannot agree on a production schedule by December 1, 2018, Plaintiffs will be permitted to respond to OIP's proposal by no later than January 4, 2018.

3. USCIS

As reported by the parties (Pls. Mot. at 2-3; Defs. Opp'n at 3), USCIS has agreed to process a minimum of 700 pages per month and complete production by February 28, 2019.

C. Deadline for Vaughn Indices

Plaintiffs have requested that Defendants be made to produce rolling Vaughn indices two weeks after each monthly production. (Pls. Mot. at 1.) According to Defendants, Vaughn indices may be unnecessary and should not be submitted on a rolling basis or prior to the filing of summary judgment motions, and the effort required to compile them would slow down Defendants' processing of Plaintiffs' FOIA requests. (Defs. Opp'n at 5-6.)

The court agrees with Defendants that Vaughn indices may prove unnecessary. Up to this point, Defendants have informed Plaintiffs of the FOIA exemptions that they are asserting as bases for withholding documents. (See Pls. Mot. at 2-3 (listing the exemptions Defendants have asserted as bases for their withholdings).) Cf. Minier v. CIA, 88 F.3d 796, 804 (9th Cir. 1996) (stating that a Vaughn index is unnecessary when a FOIA requester "has sufficient information

to present a full legal argument” about whether an agency complied with its request); Brennan Ctr., 300 F. Supp. 3d at 550-51 (finding that a Vaughn index was warranted because the agency had provided no information regarding the exemptions it planned to claim). Moreover, the court is sympathetic to Defendants’ claim that having to compile Vaughn indices would undermine their ability to process documents expeditiously.

As Defendants withhold documents from production, they should continue to update Plaintiffs as to which exemptions they are asserting. Plaintiffs may renew their request for Vaughn indices at a later date if they can show with specificity that they need the indices in order to challenge Defendants’ claimed exemptions properly.

D. Dispositive Motion Briefing

Finally, Plaintiffs ask that the court direct Defendants to file any dispositive motions by March 28, 2019. (Pls. Mot. at 1, 6.) Defendants posit that it would be premature to set a briefing schedule before production is complete because the parties do not yet know what issues, if any, will be in dispute. (Def. Opp’n at 6.)

The court agrees with Plaintiffs that a deadline for dispositive motions would promote the efficient resolution of this case. The parties shall proceed as follows. First, as discussed above, OIP shall conclude its search for potentially responsive documents, confer with Plaintiffs, and submit a proposed production schedule by no later than December 21, 2018; if Plaintiffs do not consent to OIP’s proposal, they shall respond by no later than January 4, 2019. Next, the court will set a deadline by which OIP must complete production and simultaneously set a deadline for the submission of dispositive motions that is roughly one month after OIP’s production deadline.

IV. CONCLUSION

For the foregoing reasons, the court GRANTS IN PART Plaintiffs' Motion for a Global Scheduling Order (Dkt. 33). DHS and USCIS are DIRECTED to produce all outstanding records on a rolling monthly basis by no later than February 28, 2019. OIP is DIRECTED to complete its search for records potentially responsive to Plaintiffs' FOIA request, confer with Plaintiffs, and propose a production schedule to the court by no later than December 21, 2018; if Plaintiffs do not agree with OIP's proposed schedule, they shall respond by no later than January 4, 2019. When the court sets a deadline for OIP to complete production, the court will simultaneously set a deadline for the submission of dispositive motions. The court declines to order Defendants to produce Vaughn indices at this time; Plaintiffs may renew their request at a later date.

SO ORDERED.

Dated: Brooklyn, New York
November 16, 2018

s/Nicholas G. Garaufis

NICHOLAS G. GARAUFIS
United States District Judge