

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

)	
GOVERNMENT ACCOUNTABILITY)	
PROJECT,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 19-0449 (RDM)
)	
UNITED STATES DEPARTMENT OF)	
STATE, <i>et. al.</i> ,)	
)	
Defendant.)	
)	

DEFENDANT’S OPPOSITION TO PLAINTIFF’S MOTION TO COMPEL

Defendant U.S. Department of State (“State” or the “Department”), by and through undersigned counsel, respectfully submits this opposition to Plaintiff’s September 1, 2020 Motion to Compel the Department of State’s Compliance with the Court’s July 22, 2020 Order (“Motion”) (ECF No. 51). In short, despite Plaintiff’s misstatements and mischaracterizations regarding the Department’s efforts, the Department has made a concerted effort to process Plaintiff’s prioritized request diligently, and all of the Department’s proposals have been consistent with the mutually shared goal of processing this document set most efficiently. The Department completed its monthly processing and made a production to Plaintiff on the morning of September 1, 2020. As addressed herein, State believes it is in compliance with the Court’s July 22, 2020 Order.

During the July 22, 2020 telephone status conference, the Court ordered State to adopt Plaintiff’s proposed prioritization and to inform Plaintiff of the volume of records identified and the timeframe for completion of that prioritization. The Court, appropriately given the serious constraints on the Department’s processing capabilities as a result of the ongoing COVID-19 pandemic, declined to set a specific minimum processing rate and instead directed that its order

would require State to “endeavor to process as many records from that group as they can.” Hr’g. Tr. (Jul. 22, 2020), ECF No. 50; *see* ECF No. 51 at 2.

To comply with the Court’s Order, State conducted new searches to identify documents potentially responsive to the prioritized request. In addition to searching variations of the names of the individuals identified in the prioritization, State conducted further searches to identify possible email addresses, as the names specified in the request are private individuals, and then searched for those possible email addresses. As directed by the Court, State reported to Plaintiff on July 29 that its searches had resulted in approximately 2,700 documents for processing. State’s estimate was not, as Plaintiff claims, “wildly overbroad,” ECF No. 51 at 3, and, as evidenced in the email chain Plaintiff attaches as Exhibit 1, State did not suggest that there were approximately 2,700 *responsive* documents, *see* ECF No. 51-1.¹ Indeed, it is typical in FOIA cases that the initial number of documents collected for processing is larger than the number of documents subsequently identified as being responsive to a request, and is a natural and necessary byproduct of the Department’s efforts to ensure that all responsive material is collected in its initial searches.

State informed Plaintiff in the same email that it intended to conduct an initial responsiveness review, a process sometimes undertaken to maximize overall processing efficiency in certain instances where the Department anticipates a particularly low volume of responsive material in relation to the potentially responsive material that it has collected, and that it would

¹ Likewise, the Department disagrees that the volume of records “as of the filing of this motion is still a moving target.” *See* ECF No. 51 at 3. As explained in more detail below and reflected in Exhibit 1 to Plaintiff’s Motion, ECF No. 51-1, the Department reported to Plaintiff on August 6 that its initial review and additional searches based on information provided by Plaintiff resulted in approximately 140 potentially responsive documents. That figure has not changed since it was reported.

report the results of that review the following week.² Here, the initial responsiveness review was intended to cull out those documents that were facially non-responsive to the prioritized request (e.g., emails that were not to or from one of the identified individuals or emails that were to or from other individuals with the same or similar names). Completion of the initial responsiveness review is a necessary first step toward ultimately determining the volume of responsive material to be further processed. Otherwise, any completion timeline would be merely speculative. Plaintiff raised no objection to these aspects of State's prioritized processing plan until its present Motion.

On August 5, 2020, Plaintiff responded to a July 29 inquiry from the Department by providing particular email addresses to incorporate into the Department's new search. By that time, however, the Department had completed its initial responsiveness review of the approximately 2,700 documents. The Department nevertheless conducted further additional searches based on these newly provided email addresses. The next day, on August 6, the Department informed Plaintiff that the results of the initial responsiveness review, combined with the results of the additional searches (which had not been part of the initial responsiveness review), identified a total of approximately 140 documents *potentially responsive* to Plaintiff's prioritized request (not, as Plaintiff states, "140 responsive documents"). *See* ECF Nos. 51 at 3, 51-1.

Also on August 6, State proposed that it would make an initial production of responsive, non-exempt material on or before September 17. Contrary to Plaintiff's specious claims regarding this proposal, the Department's proposed production date was not part of a scheme to disregard the Court's instruction regarding processing, but it was rather a proposal taking into account

² One week is much faster than typical for completion of an initial responsiveness review of this volume of documents, but the Department dedicated its resources to completion of the review within this timeframe to comply with the Court's Order.

relevant processing factors and made in good faith and consistent with processing schedules agreed to in similar cases. As explained to Plaintiff, the proposed date would have reflected the length of a typical processing cycle between productions (rather than a shortened one resulting from the Department's searches and initial responsiveness review), which would naturally allow the Department to potentially process more material for the first production, and ultimately more efficiently process the overall priority set. *See* ECF No. 51-1. Despite multiple interim communications, Plaintiff did not indicate disagreement with the proposed production date until August 17. The Department explained the potential efficiency benefits of its proposed date, but Plaintiff continued to object to it. In a show of good faith, the Department changed course and adopted an August 31 production date, adjusting its processing and production plans accordingly. Throughout the remainder of August, State worked diligently on the priority set and processed as many records as it could, consistent with the Court's instruction.³

The Department made its first production of responsive, non-exempt material from this priority set to Plaintiff on the morning of September 1. As the Department informed Plaintiff by email, *see* ECF No. 51-2, and as stated in Defendants' September 1 Status Report,⁴ *see* ECF No.

³ Contrary to Plaintiff's claim, the Department did not propose that it process the priority set at a rate of fewer than 190 pages per month. *See* ECF No. 51 at 3. Rather, the Department reported that it anticipated completing processing in approximately four months, based on a proposed first production from the set in mid-September (which would therefore equate to three productions). When Plaintiff appeared to misunderstand this timeline and told State that it did not believe that processing fewer than 190 pages per month complied with the Court's directive, the Department promptly clarified that its estimate was equivalent to three productions based on a mid-September first production date. The Department reiterated that this timeline simply reflected "a conservative, outside estimate to account for the serious delays and difficulties in obtaining the necessary internal and external clearances as a result of staffing changes due to the ongoing COVID-19 pandemic, and the Department may also be able to complete processing more quickly." State further assured Plaintiff that it was "continuing to process as much as possible." ECF No. 51-1.

⁴ Pursuant to the Court's July 22, 2020 Order, the parties were required to file a joint status report by September 2. Undersigned counsel attempted to engage Plaintiff on the joint status report. But, instead of responding on this matter, Plaintiff proceeded to file the instant Motion to

52, for this production the Department processed approximately 40 of the approximately 140 potentially responsive documents at issue. The Department determined that eight of those documents were responsive and accordingly produced the non-exempt portions of those documents to Plaintiff.⁵

While the Department takes its production obligations seriously, Government-wide staffing constraints during the COVID-19 pandemic have created myriad serious processing challenges, including difficulties in obtaining necessary clearances from other Department components or other Executive Branch components. The Department does not release documents in FOIA until it receives clearances from those components with equities in the information in those documents since such information is needed to make appropriate exemption and release determinations. *See* ECF Nos. 51-1, 51-2; Declaration of Eric F. Stein, ECF No. 31-1, ¶¶ 18–20; Third Declaration of Eric F. Stein, ECF No. 42-1, ¶ 21. Despite these challenges, the Department

Compel. Interpreting this action as a refusal to participate in the joint status report process, undersigned counsel proceeded to file a status report on behalf of Defendants on September 1. *See* ECF No. 52. Plaintiff then, without communicating its intent to undersigned counsel or the Department, nor seeking to meet and confer, unilaterally filed a status report with the Court on September 2, including new and unreasonable prioritization and processing demands. As Plaintiff has violated the Court's meet and confer requirements by submitting these proposals to the Court without first engaging with the Department, the Court should reject Plaintiff's proposals on their face. Out of an abundance of caution, the Department will prepare a response addressing the unreasonableness of Plaintiff's demands.

⁵ State did not, as Plaintiff indicates, notify Plaintiff that it had determined that 32 of 140 documents were non-responsive. *See* ECF No. 51 at 3. Rather, as reflected in Exhibit 2 of Plaintiff's Motion, ECF No. 51-2, when Plaintiff inquired if State had only processed 16 pages for the month of August, State clarified that the documents included in the production reflected the *responsive* records State had processed and State had in fact processed approximately 40 records, the remainder of which were determined to be non-responsive. Plaintiff's dissatisfaction with the number of pages in the September 1 production is irrelevant to whether the Department met its obligation to endeavor to process as many records as it could. The foregoing description of the Department's efforts clearly demonstrates that this obligation was met.

succeeded in making its production on the morning of September 1, 2020, and the Department has complied with both the letter and spirit of the Court's July 22, 2020 Order.

Finally, the Department points out that Plaintiff filed this Motion to Compel several hours *after* the Department made its production. Thus, Plaintiff's Motion was moot before it was even filed. Plaintiff's unnecessary litigation efforts create a significant burden on judicial and agency resources—agency resources that would otherwise be focused on processing this and other Plaintiffs' FOIA requests. In October 2019, Plaintiff filed a motion to compel production of documents in this case from another Defendant agency. ECF No. 18. There, the Defendant agency made its monthly production just over a week after Plaintiff's motion, and this Court ultimately ruled that the motion was moot once the agency had complied. Here, by contrast, Plaintiff's Motion was already moot by the time Plaintiff filed it. Plaintiff decries a production delay of mere hours in the context of severely hampered Department resources amid a global pandemic, in a circumstance where, after Plaintiff waited nearly two weeks to reject a reasonable production proposal, the Department still managed to process and produce a set of documents on an extremely shortened timeline. State has acted in the utmost good faith in these proceedings.

* * *

CONCLUSION

For the foregoing reasons, the Department respectfully requests that the Court deny Plaintiff's Motion to Compel.

Dated: September 4, 2020
Washington, DC

Respectfully submitted,

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By: _____ /s/

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