

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER,)
)
 Plaintiff,)
)
 v.) Civil Action
) No. 00-1849 JR
 DEPARTMENT OF JUSTICE, et al.,)
)
 Defendants.)
 _____)

PLAINTIFF'S MOTION FOR AN ORDER ESTABLISHING A
SCHEDULE FOR THE PROCESSING OF RESPONSIVE AGENCY RECORDS

For the reasons set forth below, plaintiff respectfully moves for the entry of an order establishing a schedule for defendant FBI's processing of agency records responsive to plaintiff's Freedom of Information Act ("FOIA") request concerning the "Carnivore" surveillance system. A proposed order accompanies this motion.

BACKGROUND

Plaintiff filed this action on July 31, 2000, upon defendants' failure to timely respond to plaintiff's request for expedited processing of its FOIA request for records relating to the "Carnivore" system. On August 2, 2000, plaintiff moved for the entry of an order directing

defendants to grant plaintiff's request for expedited treatment of its request. See Plaintiff's Motion for a Temporary Restraining Order and a Preliminary Injunction and Memorandum in support thereof. The Court scheduled a hearing on plaintiff's motion for the afternoon of August 2. Little more than an hour before the scheduled hearing, defendant FBI faxed to plaintiff a letter granting plaintiff's request for expedited processing.

Citing defendants' belated grant of plaintiff's expedition request, the Court found it unnecessary to enter the order plaintiff sought. The court did, however, direct defendants to file, within ten days, a report detailing the manner in which defendant FBI would "expedite" the processing of plaintiff's request and, in effect, articulating defendants' understanding of the statutory mandate to process the responsive material "as soon as practicable," 5 U.S.C. § 552(a)(6)(E)(iii).

Defendants' Report

On August 16, 2000, defendants filed their status report. They initially suggest that plaintiff has improperly named two of the three defendants, Defendants'

Status Report ("Report") at 1 n. 1, and that plaintiff failed to exhaust administrative remedies, *id.* at 2 n. 2.¹ Defendants then devote less than one page of their four-page submission addressing the question they were directed to answer: how they intend to expedite the processing of plaintiff's FOIA request.

Defendant FBI reports that it has located "approximately 3,000 pages of material responsive to plaintiff's request." Report at 4. Defendants assert that "a large amount of responsive material" was submitted by "outside commercial entities" and that those entities must be notified of plaintiff's request and provided an opportunity to "weigh in" on the issue of disclosure. *Id.* Finally, defendant FBI reports that it "anticipates that it will be in a position to begin making interim releases to plaintiff in approximately 45 days," and that it "plans to make a release every 45 days until all responsive material is processed." *Id.* Defendants thus conclude that "the FBI

¹ Those assertions should properly be raised in a motion to dismiss, to which plaintiff would fully respond with relevant authority.

is processing plaintiff's FOIA request as soon as practicable." *Id.*

ARGUMENT

A. The Proposed Schedule is Entirely Open-Ended

Unfortunately, defendants' report demonstrates that the concerns that motivated plaintiff to seek judicial review were well-founded. The report also suggests that the Court properly expressed its concern that defendant FBI might "take the position that 'as soon as practicable' means whatever they think it means." Transcript of TRO Hearing at 7 (attached to Report as Exhibit C).

Defendants' proposed processing schedule is entirely discretionary and open-ended, includes no date for the completion of processing and is, in effect, completely meaningless.

Without providing the Court and plaintiff with even a benchmark or a goal specifying the *actual number* of pages of material that will be processed in each of the proposed 45-day periods, defendants offer absolutely no basis for concluding that the processing will be completed "as soon

as practicable." Should defendant FBI process 100 pages within each period, for instance, it would take almost four years for processing to be completed. At a rate of 500 pages per period, the process would last for nine months. Neither result, by any stretch of the imagination or the English language, can be characterized as "expedited."

Defendants have not reported on the number of FBI employees assigned to the processing of plaintiff's request, a fact that is indispensable in assessing what rate of processing is "practicable." According to information posted at defendant FBI's website, "the FOIPA Section of the Office of Public and Congressional Affairs has expanded . . . to a staff of approximately 400 as of January 1998." (<http://foia.fbi.gov/intro.htm>). Just a small fraction of the FOIA staff, devoted to a priority project for a brief period of time, would presumably be capable of processing 3,000 pages of material within a short -- and identifiable -- time period.

B. Outside Consultation will not Delay Processing

In support of their wholly vague and open-ended processing schedule, defendants imply that a significant

part of the document review process is out of the control of defendant FBI due to the need for consultation with "outside commercial entities." Such consultation, however, is not an open-ended process. Applicable Department of Justice regulations state that "[a] component shall provide a submitter with prompt written notice of a FOIA request or administrative appeal that seeks its business information . . . in order to give the submitter an opportunity to object to disclosure." 28 CFR 16.8(d). The component "will allow a submitter a reasonable time to respond to the notice . . . and will specify that time period within the notice," and if "a submitter fails to respond to the notice within the time specified in it, the submitter will be considered to have no objection to disclosure of the information." 28 CFR 16.8(f).

Defendants' own regulations thus provide for "prompt" notice to the commercial entities, and those notices will "specify th[e] time period" in which the entities must respond. It is clear that the timing of the consultation process is entirely within the control of defendant FBI, and that a date certain can (and must) be established for

the submission of any objections to the disclosure of commercial information.

C. Defendants Have Provided Incomplete Information

Defendants recognize that the term "as soon as practicable" can not be construed in a vacuum:

Inherent in the "as soon as practicable" standard is that the processing time for each expedited FOIA request must be determined based on the individual FOIA request and a variety of factors, *for example*, where the requested material is located, the volume of the material, the nature of the material, whether third parties have a proprietary interest in the information sought, whether classified information is involved, how many expedited requests it has, how many Court Orders the processing agency must comply with expeditiously, etc.

Report at 3. Absent from defendants' report, however, is any information concerning "how many expedited requests [defendant FBI] has," or "how many Court [it] must comply with expeditiously." Particularly in light of defendants' assertion that plaintiff's FOIA request is being processed "without respect to the FBI's current backlog of FOIA requests," *id.* at 4, it is important to know exactly what other processing demands might be competing with

plaintiff's request. Defendants have failed to assert any such demands.

D. Defendants Are Expediting Their
Own Review of the Carnivore System

Defendants' refusal to agree to process the requested material by a date certain, in a truly expedited manner, is particularly egregious when viewed in relation to defendants' handling of a closely related process. On August 10, defendant Reno announced that a major university will soon be selected to analyze and review the capabilities and use of the "Carnivore" system. *U.S. to Pick Team to Evaluate FBI E-Mail Tap*, CHICAGO TRIBUNE, August 11, 2000 (attached hereto as Exhibit A).

Defendant Reno stated that "[t]he university review team will have total access to any information they need to conduct their review," and that "I would hope we could do it quickly." *Id.* Assistant Attorney General Steven Colgate indicated that a final report, including the comments of a second group of experts and internal recommendations, will be completed by December 1. *Id.*

Plaintiff submits that defendants' deadline for the completion of its own review, which will include the provision of "any information" needed by the university reviewers, provides the Court with a benchmark against which the reasonableness of defendants' open-ended FOIA schedule can be measured. Were the Court to impose a processing completion deadline of December 1 on defendants, they would be required to process material at a rate of less than 1000 pages per month. Particularly in light of the fact that a substantial amount of the relevant material will be provided to the university review team, plaintiff believes that such a schedule is clearly practicable and would not impose an undue burden on defendants. Indeed, the proposed schedule would constitute an extremely generous interpretation of the statutory mandate for expedited processing.

CONCLUSION

The Court should grant plaintiff's motion and order defendants to begin making interim releases to plaintiff within 30 days, and to make further releases every 30 days

until the completion of processing no later than December
1, 2000.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of plaintiff's motion for an order establishing a schedule for the processing of responsive agency records, and proposed order, has been served on Lisa Barsoomian, Assistant U.S. Attorney, 555 4th Street, N.W., 10th Floor, Washington, DC 20001, by hand-delivery this 17th day of August, 2000.

DAVID L. SOBEL