

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES MADISON PROJECT, et al.,

Plaintiffs,

v.

OFFICE OF DIRECTOR OF NATIONAL
INTELLIGENCE,

Defendant.

Civil Action No. 23-3457 (APM)

JOINT STATUS REPORT

Plaintiffs, James Madison Project and Brian J. Karem, and Defendant, Office of the Director of National Intelligence (“ODNI”), through counsel, respectfully submit this Joint Status Report pursuant to the Court’s February 8, 2024, Minute Order.

1. This is a Freedom of Information Act (“FOIA”) case. Plaintiffs filed their complaint on November 16, 2023, and Defendant timely answered on January 19, 2024. The case concerns a March 16, 2023, FOIA request Plaintiffs submitted to the Office of the Director of National Intelligence.

DEFENDANT’S POSITION

2. As previously reported, Defendant has completed a search and located a total of 365 pages of records responsive to Plaintiff’s FOIA request. Although the version of the pages first located by Defendant’s FOIA processing team had redactions to protect whistleblower information, the FOIA processing team then received the Office of the Intelligence Community Inspector General (“ICIG”)’s unredacted version of the pages on March 7, 2024. As previously reported, Defendant was not able to estimate the dates for release because the documents would

require consults or referrals, and Defendant is unable to control the speed with which other agencies handle such consultations or referrals.

3. Defendant reports that it has been conducting a classification review of the unredacted documents and determining which consults and/or referrals to send to other government agencies.

4. The Court has previously issued two minute orders relevant to the consultation effort, ordering (1) Defendant to determine which agencies must be consulted and the estimated amount of time needed to complete any such consult, and (2) to provide the timing estimates for the consults in this April 2024 joint status report.

5. Specifically, on February 8, 2024, the Court included the following instruction in the Minute Order:

[W]ithin 30 days, Defendant shall determine which other agencies must be consulted with respect to the 291 pages and secure a time estimate as to how long it will take those agencies to provide their input. The court notes that Defendant's own regulations provide that, unless disclosure would cause damage to national security, "[i]f another agency accepts responsibility for responding to a particular record, ODNI will notify the requester of the referral. When appropriate and available, the notice will include a point of contact for the other agency." 32 C.F.R. §§ 1700.5(c)(2)(ii), (c)(3). The parties shall submit an additional Joint Status Report on or before March 8, 2024.

6. On March 8, 2024, the Court then issued a Minute Order with the following direction:

The parties shall file an additional Joint Status Report on or before April 8, 2024. During that time, Defendant shall determine from the consulting agencies precisely how much they will require to complete their review and provide those time estimates in the next Joint Status Report.

7. The process of referral, coordination, and consultation are three distinct concepts.¹ First, when an agency locates records which originated with another agency or component, these records should ordinarily be “referred” to the originating agency for processing and direct response to the requester. Second, modified procedures are sometimes needed to avoid inadvertently revealing a sensitive fact that could invade someone’s personal privacy, damage national security interests, or otherwise harm an interest protected by an applicable FOIA exemption—as when classified records originate with an agency that is a member of the Intelligence Community. In such a situation, the agency that originally received the FOIA request will typically respond to the requester itself, after “coordinating” with the Intelligence Community agency that originated the records. Finally, it is appropriate for an agency subject to a FOIA request to “consult” with another agency or entity which holds an interest in the responsive documents, to obtain its views prior to disclosure of the records.

8. Certain regulations specify the procedures for referral, coordination, and consultation by the ODNI. *See* 32 C.F.R. § 1700.5. Under these regulations, when another agency accepts responsibility for responding to a particular record referral, the standard referral procedures provide that Defendant will notify the requestor of the referral and that such notice will include a point of contact for the referral agency “[w]hen appropriate and available.” 32 C.F.R. § 1700.5(c)(2)(ii), (c)(3), *cited by* Minute Order of Feb. 8, 2024. There is an exception that applies in situations when disclosing the identity of the agency to which the referral would be made could harm an interest protected by an applicable FOIA exemption; in such circumstances, Defendant

¹ *See generally Referrals, Consultations, and Coordination: Procedures for Processing Records When Another Agency or Entity Has an Interest in Them*, U.S. Dep’t of Just., <https://www.justice.gov/oip/blog/referrals-consultations-and-coordination-procedures-processing-records-when-another-agency> (last updated July 26, 2021).

instead coordinates with the originating agency to seek its views on the disclosure of the record and then informs the requester of the release determination. *Id.* § 1700.5(c)(3).

9. Unlike provisions governing referrals, the regulations do not direct the ODNI to provide notice of a consultation to a requestor, let alone one that includes a point of contact for the consulting agency. *See generally* 32 C.F.R. § 1700.5 (no analogous provision requiring the ODNI to provide the requestor with notice of a consultation). There are often sensitivities implicated by revealing the identity of a consulting agency, and indeed, Defendant in the last joint status report mistakenly expressed or implied that it would inform Plaintiff of the name of each agency associated with any required consult, once they had been determined. *Jt. Status Rpt. of Mar. 8, 2024* (ECF No. 11) ¶ 3. Unlike referrals, the regulations do not require Defendant to provide a requestor with a notice of a consultation under any circumstances. Nor has the Court ordered Defendant to identify consulted agencies by name.

10. In accordance with the Court's Minute Order of March 8, 2024, Defendant below provides the date by which each of the ten agencies or government bodies to which Defendant has sent consults anticipates completing the consult. Additionally, Defendant has determined that it can reveal the names of some of the ten consulting agencies or government bodies to Plaintiff without harming an interest protected by an applicable FOIA exemption. Those agencies or bodies are identified by name below. Where identification is not possible, the agency or body is identified by letter:

- i. U.S. Army Intelligence and Security Command: Consult response received April 3, 2024
- ii. Naval Criminal Investigative Service: Consult response received April 5, 2024

- iii. Department of Defense: Expected completion date of July 8, 2024.
- iv. National Security Council: Expected completion date of July 15, 2024.
- v. Central Intelligence Agency: Expected completion date of July 31, 2024
- vi. Agency A: Expected completion date of May 3, 2024
- vii. Agency B: Expected completion date of July 15, 2024
- viii. Agency C: Expected completion date of July 15, 2024
- ix. Agency D: Expected completion date of August 1, 2024
- x. Agency E: Expected completion date of August 1, 2024

11. In addition to providing the foregoing information for the consultations, Defendant has determined that it will need to refer records, and it is in the process of sending out those referrals. For each referral, Defendant will determine whether a point of contact is available and appropriate to send to Plaintiff. Defendant anticipates completing the process of sending out referrals by May 10, 2024.

12. The Defendant proposes that the Parties file an additional Joint Status Report on or before May 23, 2024, to update the Court on the status of the FOIA request.

PLAINTIFFS' POSITION

13. The above-described pathway and timetable for the production of all non-exempt portions of the requested record in this FOIA case is completely unacceptable and unjustified. This FOIA request was submitted to the Defendant more than a year ago. The lawsuit was initiated six months ago, and every step of the way the Defendant has provided incomplete answers that has necessitated the Plaintiffs pushing back and seeking intervention by the Court. The Plaintiffs identified a specific single record for which disclosure was being sought. *See* Complaint at ¶7 (Dkt. 1)(filed November 16, 2023). Initially the Defendant claimed it had identified a document that was

291 pages in length. *See* Joint Status Report at ¶3 (Dkt. 10)(filed February 7, 2024). Then it increased that number to the current number of 365 pages. *See* Joint Status Report at ¶2 (Dkt. 11)(Filed March 8, 2024).

14. Some of these consulting agencies are requesting up to four months to respond to the Defendant yet there is absolutely no supporting justification that would allow this Court to determine appropriateness given it is unknown how much information is being provided to each respective agency and why that agency then requires the period of time that has been requested. Clearly, for example, if an agency is being provided one page to review versus one hundred pages, there should be a noticeable difference in the time required to respond. It is unreasonable to assume that each of these agencies is required to review the entire 365 pages because they simply would not have similar equities (and, as noted previously, we are aware of the contents of the record). There is also no explanation provided, even if through an *in camera, ex parte* submission, to justify the application of any exception pursuant to 32 C.F.R. § 1700.5(c)(3) to permit the withholding of the names of five consulting agencies.

15. Significantly, there is absolutely no acknowledgment or consideration of the fact that the Defendant granted this request expedited processing. *See* Answer at ¶13 (Dkt. 7). If that determination means anything, there has certainly been no evidence of it. The Department of Justice’s own Guide to the Freedom of Information Act notes that “[a]n agency that grants expedited processing of a request must process it “as soon as practicable.””

https://www.justice.gov/oip/page/file/1199421/dl?inline at 40-41, *citing* 5 U.S.C.

§ 552(a)(6)(E)(iii). Indeed, the Guide even highlights that an agency’s failure to process such a request within the twenty-day non-expedited time limit has raised a rebuttable presumption that the agency has failed to process the request “as soon as practicable.” *Id.* at 41; *see Elec. Priv.*

Info. Ctr. v. DOJ, 416 F. Supp. 2d 30, 39 (D.D.C. 2006) (“The legislative history of the amendments makes clear that, although Congress opted not to impose a specific deadline on agencies processing expedited requests, its intent was to ‘give the request priority for processing more quickly than otherwise would occur,’” quoting S. Rep. No. 104-272, at 17 (1996); *ACLU v. DoD*, 339 F. Supp. 2d 501, 503-04 (S.D.N.Y. 2004) (“While it would appear that expedited processing would necessarily require compliance in fewer than 20 days, Congress provided that the executive was to ‘process as soon as practicable’ any expedited request,” citing § 552(a)(6)(E)(iii). An additional four months for nothing more than consultations on top of the one year that has already elapsed (and as noted below the forthcoming referrals) certainly does not appear to constitute “as soon as practicable”).

16. To compound the unacceptable nature of this process further, we now learn that beyond the consultations required, the Defendant has determined that referrals will be necessary but are provided no details. The Plaintiffs find it inconceivable that the Defendant would not have anticipated what questions would arise in light of the Court’s last two Minute Orders including, but not necessarily limited to: who are these agencies that will require information to be referred to it, how much information is at issue, and by what date do those agencies anticipate those responses? Instead of proactively addressing this information, once again the Defendant takes a delay position necessitating the Plaintiffs to request further Court intervention.

17. If desired by the Court, the Plaintiffs are willing to make available for an *in camera*, *ex parte* substantive discussion the whistleblower whose complaint is the subject of this FOIA lawsuit. This is necessary to protect the identity of the individual who properly filed their “Urgent Concern” complaint with the Defendant’s Office of Inspector General and who maintains a legal right to remain anonymous, including from the Defendant and its counsel. The whistleblower’s

undersigned counsel, Mark S. Zaid, is also willing to participate in this conversation since he received authorized classified access to review nearly the entire document in question. Both the whistleblower and counsel can attest to the fact that many portions/paragraphs of the record are not marked classified (at a minimum the Court should consider reviewing the document *in camera* to verify the Plaintiffs' statement), and that there are factual disputes/questions surrounding the participation of some of the identified (and perhaps unidentified) consulting agencies, i.e., why are they involved and is this unnecessarily causing inappropriate delay. While it is understood this is not a typical fact pattern for Plaintiffs in FOIA cases, there is absolutely nothing prohibiting it, whether in regulation or law.

18. The importance of the document in this case cannot be understated. On March 31, 2024, the renowned news program 60 Minutes aired a rare two segment episode on "Targeted Americans," specifically pertaining to new evidence obtained regarding Anomalous Health Incidents. See <https://www.youtube.com/watch?v=JdPSDISUYCY> (full 60 Minutes episode); <https://www.cbsnews.com/news/havana-syndrome-culprit-investigation-new-evidence-60-minutes-transcript/> (60 Minutes transcript). The impact of this broadcast was so significant that it prompted at least three major news organizations, which span the political spectrum, to issue editorials calling for additional governmental investigations into what and who is harming federal employees and their families.² The document subject to this FOIA lawsuit, which again has been granted expedited processing and must be released as "soon as practicable", directly

² See <https://www.washingtonpost.com/opinions/2024/04/01/investigate-havana-syndrome-russia/> (Washington Post editorial); <https://www.wsj.com/articles/havana-syndrome-cbs-60-minutes-u-s-intelligence-community-russia-963bed2a> (Wall Street Journal editorial); <https://www.nationalreview.com/2024/04/a-havana-syndrome-cover-up/> (National Review editorial).

pertains to and contains information that would further support the evidence presented in the 60 Minutes broadcast.

19. The Plaintiffs respectfully request the Court order the Defendant to disclose all non-exempt portions of the 365 pages within sixty (60) days and where appropriate or necessary require it to promptly address those issues identified above. Of course, the Plaintiffs are willing to appear for either oral arguments and/or a status conference (virtual or in-person) as soon as convenient for the Court.

Dated: April 8, 2024
Washington, DC

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