

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

U.S. RIGHT TO KNOW,

Plaintiff,

v.

NATIONAL INSTITUTES OF HEALTH,

Defendant.

Civil Action No. 21-2936 (TSC)

**DEFENDANT’S OPPOSITION TO
PLAINTIFF’S MOTION TO ESTABLISH PROCESSING RATE**

Defendant, the National Institutes of Health (“NIH” or “Agency”), respectfully submits this opposition to Plaintiff U.S. Right to Know’s (“Plaintiff”) motion to compel a processing rate in this Freedom of Information Act (“FOIA”) case. In support of this opposition, the Agency submits the Declaration of Gorka Garcia-Malene (“Gorka Decl.”), the FOIA Officer at the Agency, a component of the Department of Health and Human Services.

In short, Plaintiff has filed a motion to compel the Agency to process 4,000 pages per month (ECF No. 17-44 at 1) regarding its nine-pandemic related FOIA requests at issue in this litigation. Given the overwhelming amount of FOIA requests the Agency is currently handling, particularly related to the pandemic, and the large number of FOIA cases presently in litigation, such a demand is unduly burdensome, unreasonable, and simply not feasible for the Agency. Because the Agency has 1011 pending requests, 869 requests currently in backlog, as well as 53 FOIA cases currently in litigation (Gorka Decl. ¶¶ 25, 34), and Plaintiff’s requests are only nine of many that the Agency is processing, advancing Plaintiff’s request to the front of the queue and imposing an exorbitant processing rate would require the Agency to expend a disproportionate percentage of its finite and

limited resources to benefit Plaintiff to the detriment of numerous other FOIA requesters, which have equally important FOIA requests. *Id.* ¶ 37. Moreover, contrary to Plaintiff's assertion, it is quite uncommon for a court in this District to order a production rate exceeding 500 pages per month. Finally, the claimed imminent public interest in the requested pandemic related information is greatly lessened as the Public Health Emergency due to the COVID-19 virus ended on May 11, 2023. See <https://www.cdc.gov/coronavirus/2019-ncov/your-health/end-of-phe.html>.

BACKGROUND

On November 8, 2021, Plaintiff filed a FOIA complaint requesting records related to the Pandemic. ECF No. 1. Plaintiff then moved to file an amended complaint, which was allowed, and an amended complaint was filed on February 14, 2022, identifying nine separate FOIA requests Plaintiff made to the Agency. ECF No. 8. The Agency answered the amended complaint on February 28, 2022. ECF No. 10. A review of the amended complaint demonstrates that Plaintiff has submitted nine separate and extremely broad FOIA requests to the Agency.¹

I. Proceedings in this Action.

The initial joint status report in this matter was filed on May 27, 2022 (ECF No. 11). This report informed Plaintiff and the Court that the Agency's searches are ongoing. The status reports that followed informed the Court that Plaintiff has another FOIA case pending against the Agency seeking COVID-19 related records, *U.S. Rt. to Know v. NIH*, Civ. A. No. 20-3196 (CKK) (D.D.C.). The Agency further informed the Court that Plaintiff's amended complaint (ECF No. 9) involves nine separate FOIA requests, which are extremely broad and very burdensome; and that the

¹ The nine FOIA requests, are located at Exhibits 101, 105, 109, 114, 120, 124, 130, 133, and 137 to Plaintiff's motion, and demonstrate the broad and burdensome nature of Plaintiff's requests.

Agency is inundated with FOIA requests that are overdue and in the queue for processing, in addition to many active FOIA litigation cases.

The Agency reported in the last status report of May 8, 2023 (ECF No. 20), that given the extraordinary burdens on the Agency, it could process 300 pages per month and that it had produced nearly 8,000 pages of records to Plaintiff in February and March 2023. These records had been produced in two other pandemic related FOIA litigations. This lawsuit and the affiliated requests encompass approximately 22,000 pages of records. *Id.* ¶ 27. Out of the 8,000 pages of records produced, approximately 3000 pages are in response to Plaintiff's requests 3 and 9. *Id.* The Agency also informed Plaintiff that documents responsive to Plaintiff's numerous requests in this case also involve several layers of review before they can be produced.

Because Plaintiff has demonstrated no legitimate basis on which to deviate from the Agency's reasonable and manageable processing rate of 300 pages per month, and because Plaintiff's requested relief would do nothing but advance Plaintiff's request to the detriment of others and impose upon the Agency, with its limited staff, an unwarranted and overly burdensome processing rate, the Agency requests that the Court deny Plaintiff's motion. To hold otherwise would harm other requesters, reduce the number of FOIA requests that the Agency can process, create more burdens for the Agency, and risk disclosure of protected information exempted from release under FOIA.

Accordingly, the Agency opposes Plaintiff's Motion to Compel to require the Agency to process Plaintiff's FOIA request at a rate more than thirteen times above its proposed 300-page standard monthly processing rate. The Agency proposes that it process 300 pages per month and anticipates that it should be able to issue its next release of information to Plaintiff by July 12, 2023, and the 12th day of each successive month. ECF No. 20 at 4.

II. FOIA Requests to the Agency From this Plaintiff

To analyze Plaintiff's motion for an accelerated processing schedule, Defendant believes a brief recitation of this Plaintiff's FOIA request history with the Agency is instructive. Plaintiff has filed thirty-six FOIA requests with the Agency (thirty-five of which since the start of the pandemic). The Agency has completed processing twenty-one of them, and fifteen FOIA requests remain open (eleven of which are the subject of civil litigation). Gorka Decl. ¶ 27. Thus, not only is the Agency burdened by a surge in FOIA requests due to the pandemic in general, but this Plaintiff is occupying an inordinate amount of the Agency's limited resources. Also, many of Plaintiff's requests are duplicative. For example, in request no. 54696—which is at issue in another civil action, *U.S. Rt. to Know v. NIH*, Civ. A. 20-3196 (CKK) (D.D.C.)—Plaintiff seeks the same records, but from a different set of custodians, as it seeks in request nos. 56212, 54077, and 55351 at issue in this case. Gorka Decl. ¶ 28. Processing overlapping sets of records in parallel streams is extremely difficult and time consuming for the Agency. *Id.* Simply put, this Plaintiff is creating a huge FOIA burden on the Agency, is negatively impacting other FOIA requesters, and is unfairly occupying a great deal of the Agency's time and limited resources. *Id.* ¶¶ 28-31. Plaintiff now wants to further burden the Agency with an untenable monthly processing rate.

As noted above, in Plaintiff's other civil action, the Agency is processing 300 pages per month. If 300 pages per month are ordered in this case as requested by the Agency, Plaintiff will be receiving 600 pages per month. If negotiations for a 300-page processing rate in a third litigation with this Plaintiff are successful, the Agency will be processing 900 pages of records to this Plaintiff alone per month. *Id.* ¶ 34.

In short, since the pandemic Plaintiff is receiving records from NIH at an impressive clip. The Agency has not sought an *Open America* stay or another procedural mechanism to halt the processing of the myriad requests at issue in this case. Rather, it has consistent with its obligations

to other FOIA requesters, crafted a reasonable processing rate. As such, the Court should reject Plaintiff's request for a faster production rate, which would occupy even more of the Agency's limited bandwidth to process FOIA requests.

ARGUMENT

I. The Court Should Exercise Its Broad Discretion in Favor of the Agency and Deny Plaintiff's Motion to Compel.

It is well established that “[c]ourts have broad discretion to determine a reasonable processing rate for a FOIA request.” *Harrington v. FDA*, 581 F. Supp. 3d 145, 150 (D.D.C. 2022) (citing *Colbert v. FBI*, Civ. A. No. 16-1790, 2018 WL 6299966, at *3 (D.D.C. Sept. 3, 2018)). “Several factors inform the analysis, including the size and compelling need of the request compared to others, as well as the effect of the request on the [agency’s] ability to review other FOIA requests.” *Id.*; see also *Mid. E. Forum v. Dep’t of Homeland Sec.*, 297 F. Supp. 3d 183, 185 (D.D.C. 2018) (observing that “courts in this Circuit have considered the effect of other FOIA requests when analyzing the burden on an agency of meeting deadlines for review and production of FOIA material in a given case”). “For instance, courts have looked to the volume of requests an agency faces, how much requests to the agency have increased in recent years, the resources and capacity of the agency, other FOIA litigation in which the agency is involved, the agency’s release policies, and how ordering swifter production would affect other FOIA requesters patiently waiting their turn.” *Harrington*, 581 F. Supp. 3d at 150 (D.D.C. 2022) (collecting cases).

That said, “[w]hen determining the rate at which a federal agency must respond to FOIA requests, courts often give deference to the agency’s release policies.” *Colbert*, 2018 WL 6299966, at *3 (collecting citations). And, in assessing a proper processing rate, “[a]gency affidavits or declarations that are ‘relatively detailed and non-conclusory’ are accorded ‘a presumption of good faith, which cannot be rebutted by purely speculative claims[.]’” *Jud. Watch, Inc. v. Dep’t of Com.*,

Civ. A. No. 17-1283, 2020 WL 6939807, at *2 (D.D.C. Nov. 25, 2020) (quoting *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991)).

Further, Plaintiff has not established that it warrants special treatment or a compelling reason to move to the “front of the line” of the Agency’s 1,011 active and pending requests, 869 of which are backlogged, and courts within this district typically consider the agency’s current workload of FOIA requests and have routinely held that an agency is not required to produce the thousands of pages of responsive information monthly that Plaintiff now requests. *See Energy Future Coal. v. Off. of Mgmt. & Budget*, 200 F. Supp. 3d 154, 161 (D.D.C. 2016) (rejecting plaintiff’s motion to mandate review of 1,000 documents per month and taking into account increase in number of FOIA requests directed to agency, number of FOIA requests under review, and number of FOIA litigations in which agency involved); *Elec. Privacy Info. Ctr. v. Dep’t of Just.*, 15 F. Supp. 3d 32, 47 (D.D.C. 2014) (denying plaintiff’s motion for preliminary injunction requesting immediate production of documents pursuant to FOIA request and weighing effect injunction would have on other FOIA requesters); *cf. Nat’l Sec. Counselors v. Dep’t of Just.*, 848 F.3d 467, 471–72 (D.C. Cir. 2017) (in context of challenge to FOIA processing fees, stating policy of processing 500 pages per request per month “serves to promote efficient responses to a larger number of requesters”). On this basis, Defendant respectfully submits that the Agency process Plaintiff’s FOIA requests at a monthly rate of 300 pages per month.

Plaintiff’s request here is not reasonable nor feasible, and this Court can exercise its authority to supervise the agency’s progress in processing Plaintiff’s request while ensuring that the Agency exercises due diligence in doing so. *Citizens for Resp. & Ethics in Wash. (“CREW”) v. FEC*, 711 F.3d 180, 189 (D.C. Cir. 2013). The FOIA statute does not impose limits on a court’s equitable powers in enforcing its terms. *Daily Caller v. Dep’t of State*, 152 F. Supp. 3d 1, 8

(D.D.C. 2015). As evidenced below, those equitable powers should not impose an unreasonable processing rate on the Agency, a resource strapped agency being faced with an incredible number of FOIA requests, particularly related to the pandemic. Gorka Decl. ¶¶ 10-19; 37. The Agency currently manages a massive number of FOIA requests and litigations. In recent years, FOIA requests to the Agency and FOIA litigations involving the Agency have increased tremendously. The COVID-19 pandemic has placed unprecedented pressure on the Agency and requests for information on the pandemic continues to outstrip the Agency's ability to process FOIA requests. *Id.*

Although the Agency has worked extremely hard in recent years to improve the FOIA program and reduce backlogs (*Id.* ¶¶ 12, 14, 20-23), this changed dramatically with the pandemic, which has resulted in a surge of FOIA requests and a huge backlog of requests. *Id.* ¶ 13. In the three years since the pandemic began, the Agency received 6,226 FOIA requests, a forty-three percent surge over the prior three pre-pandemic years. *Id.* ¶ 13. Compared with FOIA requests received in the first quarter of 2019, prior to the pandemic, the Agency has received an increase in FOIA requests of just over forty-six percent in the first quarter of this year. *Id.*

Despite the Agency's best efforts, due to the pandemic and the resulting surge in related FOIA requests, the Agency has a current backlog of 869 requests in the queue for processing and is defending fifty-three active civil cases. *Id.* ¶ 25. Further, almost all the requests received by the Agency concerning the pandemic, including Plaintiff's, are extremely broad. Thus, they require a wide-ranging search, across multiple offices, and involve many records. *Id.* ¶¶ 17-19.

In addition to the burdens imposed by the large number of FOIA requests, the Agency is currently involved in fifty-three active lawsuits, and litigation has a great and negative impact on the Agency's ability to process requests. *Id.* ¶¶ 26-34. These cases include suits brought by

Plaintiff against the Agency seeking the immediate or expedited release of tranches of records. *Id.* Plaintiff currently has four active suits against the Agency involving twelve FOIA requests. Not only that, but Plaintiff has filed thirty-six FOIA requests with the Agency. The Agency has completed processing twenty-one of them and fifteen remain open. Eleven of the fifteen remain open because they are in active litigation. *Id.* ¶ 27. Here, this is Plaintiff's second FOIA lawsuit against the Agency seeking to jump the queue ahead of other requesters. With this litigation, Plaintiff seeks to bypass 184 other requesters in front of it. *Id.*

Further, the Agency's FOIA team members are not only required to respond to FOIA requests but also have a multitude of other responsibilities. They are required to assist agency counsel in preparing answers to complaints, provide updates and edits to numerous monthly status reports, provide information in support of declarations and create templates for extremely complex and lengthy *Vaughn* indices.

The Agency's proposed review rate is to promote sound FOIA business practices by promoting the overall goal of responding to more requests each year across all requesters. By processing responses based on a 300-page increments per month, the Agency can provide more pages to more requesters across many requests (both litigation and regular FOIA requests), and avoids a system where a few requests, such as the instant requests, monopolize finite Agency processing resources. *Id.* ¶¶ 35-37.

Given the pandemic related surge in FOIA requests, the Agency has found that its standard litigation review rate of 300 pages per month capitalizes on the Agency's workflow to ensure that more pages for more requests get processed per month than otherwise would be. This number of pages per month is a manageable workflow for the Agency and maintaining this workflow ensures that the Agency can continue making efficient releases for each FOIA request that it is processing

considering the demands posed by the growing number, size, and complexity of FOIA requests received by the Agency. *Id.*

Accordingly, the 300-page review rate for litigation is ideal in maintaining the steady workflow of releases. Given the dramatically increased volume of FOIA requests and FOIA litigations in recent years due to the pandemic and considering the Agency's requirement to ensure that more requests are completed, application of the Agency's proposed 300-page per-month review rate to Plaintiff's request in this case is reasonable. Indeed, altering the Agency's standard processing to provide more information faster to Plaintiff will create an imbalance of the Agency's finite resources, which will take away resources for processing more requests, create delays and bottlenecking for other requests, and risk the disclosure of sensitive classified information if more workflow is required. *Id.*

Moreover, as courts in this Circuit have routinely held, at most a 500-page per-month processing schedule is a typical and reasonable schedule for processing records potentially responsive to FOIA requests. *See, e.g., Farahi v. FBI*, Civ. A. No. 15-2122 (RBW), 2022 WL 17338008, at *2 (D.D.C. Nov. 30, 2022) (noting 500-pages per-month FOIA processing schedule established over plaintiff's objection); *Harrington v. FDA*, 581 F. Supp. 3d 145, 150 (D.D.C. 2022) (agency policy of processing 500 pages per request per month "serves to promote efficient responses to a larger number of requesters") (quoting *Nat'l Sec. Counselors*, 848 F.3d at 471–72); *Chaverra v. Immigr. & Customs Enf't*, Civ. A. No. 18-0289 (JEB), 2020 WL 7419670, at *1 (D.D.C. Nov. 5, 2020) (concluding the standard 500-pages per-month FOIA processing schedule was reasonable and noting, "the explosion of FOIA requests and subsequent litigation has created a substantial workload for agencies"); *Daily Caller News Found. v. FBI*, 387 F. Supp. 3d 112, 121 (D.D.C. 2019) ("applying the FBI's usual processing rate of 500 pages per month" over plaintiff's

objection); *Freedom Watch v. Bureau of Land Mgmt.*, 325 F. Supp. 3d 139, 142 (D.D.C. 2018) (applying agency’s 500-page per-month release policy over plaintiff’s objection; “[t]he agency has devised methods for allocating its finite FOIA resources between competing demands”); *Colbert*, 2018 WL 6299966, at *3 (ordering standard 500-page per-month production schedule; “The FBI adheres to that policy because it is based on sound FOIA business practice, promotes efficiency, and allows the FBI to maintain proper information security. The policy also allows the FBI to process multiple complex requests simultaneously and meet litigation demands.”); *Negley v. Dep’t of Just.*, 305 F. Supp. 3d 36, 47 (D.D.C. 2018) (“The Court therefore agrees with the agency’s assessment that its ‘standard rate of 500 pages per month’ would be appropriate were [plaintiff] to seek release of such documents.”); *Middle E. Forum*, 297 F. Supp. 3d at 187 (concluding “500 pages per month is an appropriate rate of production” over plaintiff’s objection). However, these cases are either pre-pandemic or do not involve agencies such as NIH, which is dedicated to public health. Again, the unprecedented worldwide pandemic has greatly altered the FOIA landscape at the Agency.

Given the particular burdens posed by pandemic related requests to the Agency, it requests that the Court find the 300-page per month processing rate reasonable and deny Plaintiff’s request to compel an increased and wholly unsustainable processing rate above that amount.

II. FOIA Does Not Require Production from Agencies Within 20 or 30 days

Plaintiff challenges the timeliness of the Agency’s response on the grounds that FOIA requires agencies to issue a determination within twenty (or extended to thirty) business days and produce responsive non-exempt records promptly thereafter. Mot. at 31. However, the only consequence of an agency’s failure to issue a determination within the twenty-day statutory period, standing alone, is that the agency cannot rely on the administrative exhaustion requirement in the FOIA to keep a case from getting into court. *See N.Y. Times Co. v. Def. Health Agency*, Civ. A.

No. 21-0566 (BAH), 2021 WL 1614817, at *5 (D.D.C. Apr. 25, 2021) (“While agencies have 20 working days to ‘make a determination with adequate specificity, such that any withholding can be appealed administratively,’ . . . the consequence of agency delay in rendering such a determination bears only on the requester’s ability to get into court,” and, “[i]f the agency does not adhere to FOIA’s explicit timelines, the ‘penalty’ is that the agency cannot rely on the administrative exhaustion requirement to keep cases from getting into court” (quoting *CREW*, 711 F.3d at 189)); *see also Am. Ctr. for L. & Just. v. Dep’t of State*, 249 F. Supp. 3d 275, 283 (D.D.C. 2017) (“the sole penalty for mere procrastination is that the agency cannot rely on the administrative exhaustion requirement to keep cases from getting into court”) (internal quotations omitted); *Long v. Dep’t of Homeland Sec.*, 436 F. Supp. 2d 38, 43 (D.D.C. 2006) (department’s failure to comply with the FOIA statutory deadlines “does not establish plaintiffs’ right to expedited processing”).

Therefore, the remedy for missing the deadline is not to compel an agency to process records, particularly at the egregious and burdensome rate of 4,000 pages per month, as Plaintiff suggests. Further, it is well accepted in this District that “no federal agency can meet the impossibly rigorous timetable set forth in the statute.” *Nat’l Res. Def. Council v. Dep’t of Energy*, 191 F. Supp. 2d 41, 42 (D.D.C. 2002).

III. Plaintiff is Not Entitled to this Extraordinary Relief

Plaintiff has not demonstrated in its motion that it is entitled to the extraordinary relief it requests. Indeed, the facts presented here warrant denial of the motion to compel. Although the Agency is not seeking a stay of this case under *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976),² because the Agency is processing the request at issue, it is

² Defendant reserves the right to move for an *Open America* stay in this case.

appropriate for the Court to consider the facts, circumstances, and practicalities facing the Agency's FOIA staff in evaluating Plaintiff's request for an immediate and burdensome production. *See, e.g., Mid. E. Forum*, 297 F. Supp. 3d at 185 (courts in D.C. Circuit have considered the effect of other FOIA requests when analyzing the burden on an agency of meeting deadlines for review and production of FOIA material); *Elec. Privacy Info. Ctr. v. Dep't of Just.*, 15 F. Supp. 3d 32, 47 (D.D.C. 2014) (denying plaintiff's motion for preliminary injunction requesting immediate production of documents pursuant to FOIA request, weighing the effect an injunction would have on other FOIA requesters, and noting that agencies typically respond to FOIA requests on a "first-in/first-out" basis unless a requestor shows a compelling need for expedition).

Plaintiff offers an argument in favor of accelerating the Agency's processing rate that does not justify an order that would require the Agency to deviate from a reasonable processing rate and overly burden an already stressed agency. The main thrust of Plaintiff's request for a processing rate of 4,000 pages per month is the notion that records related to the pandemic are of particular interest to the public. While indeed the interest may still be there, there is no imminent need as the Public Health Emergency caused by the COVID-19 pandemic came to an end on May 11, 2023, and the national emergency is over. Further, at its core, this case is no different from the other cases that the Agency is handling and certainly of no more importance. Even if there is an ongoing public interest in this case it does not warrant the imposition of a burdensome, impractical, and unreasonable processing rate, particularly since the public health crisis is over. *Daily Caller*, 387 F. Supp. 3d at 121 (denying Plaintiff's request for a 1,200 page per month production schedule in a claimed matter of critical media interest and relevance to ongoing current events, and instead ordering 500 pages per month per the agency's policy).

Under FOIA, the Court, while recognizing the public's need for documents to show what the Government is up to, must also be cognizant of the incredible strain and burden being placed on agencies such as the Agency. The Agency's FOIA office has been inundated by increasing numbers of FOIA requests and litigation since the pandemic started and continuing into this year, on top of many other responsibilities. Gorka Decl. ¶¶ 10-37. The Court in *American Center for Law & Justice v. Department of Homeland Security*, Civ. A. No. 21-1364 (TNM), 2021 WL 5231939, at *3-5 (D.D.C. Nov. 10, 2021), discussed the history and burdens of FOIA and noted that "[c]ourt dockets in this district overflow with [FOIA] matters. Many of those cases seek reams of records, requiring massive efforts from defendant agencies" which require at times "Sisyphean effort to respond". *Id.* Non-profit FOIA plaintiffs are responsible for creating much of the backlog, some of whom the Court referred to as "frequent flyers." *Id.*

Such is the case here. Plaintiff has four active FOIA suits and has filed thirty-five FOIA requests with the Agency since the pandemic. The Agency is currently expending significant and disproportionate resources on processing Plaintiff's various requests and defending litigations it has instituted. Gorka Decl. ¶¶ 1-37.

In short, forcing the Agency to produce requested records on an impracticably accelerated schedule for this Plaintiff raises a significant risk of harm to the public and privacy interests, which are served by the thorough and thoughtful processing of responsive agency records prior to their ultimate production. *Id.* ¶ 37. At the same time, Plaintiff's effort to accelerate review of its requests necessarily will displace in processing priority those of others who submitted equally urgent requests before Plaintiff. *Id.* Balanced against these substantial interests, Plaintiff's bald reliance on its own interest in obtaining the sought-after records vis-à-vis the more generalized public

interest in the disclosure of records does little to distinguish Plaintiff's requests from just about every other time sensitive FOIA request before the Agency.

IV. Applying Plaintiff's Requested Processing Rate Would Be Detrimental to Other Requesters and the Public

The Agency is producing thousands of pages of records in response to multiple other FOIA matters and has more than 1000 open FOIA requests in its queue and 869 in backlog, many submitted prior to the request at issue here. *Id.* ¶¶ 25, 27, 37. Devoting any more of the Agency's finite resources to Plaintiff's request would further reduce the already strained resources the Agency has available. For every resource devoted to processing records in FOIA lawsuits, fewer pages can be processed for requesters whose requests are pending at the administrative stage. Nonetheless, Plaintiff seeks an order from this Court to increase the monthly processing rate to 4,000 pages per month. This thirteen-fold increase over the Agency's standard processing rate would divert resources from other requesters every month. Were the Court to allow Plaintiff's motion, the Agency would have to divert resources directly away from hundreds of other requesters so that the Agency could process Plaintiff's nine requests instead. *Id.*

Moreover, the increased processing rate will also adversely affect many other requests in an indirect manner. *Id.* For all other responses, including those that predate Plaintiff's request, that the Agency is processing concurrently, the swell of additional pages processed for Plaintiff would run the risk of causing bottlenecks at the point of the process in which the Agency must consult with other agencies. *Id.* ¶¶ 31-37. *See Open Am.*, 547 F.2d at 612 (addressing the harmful effects to FOIA requests that predated plaintiff's request).

This is especially the case here where, given the broad and unwieldy nature of Plaintiff's nine FOIA requests, the Agency will have to consult with other components and agencies who share equities in the Agency's records and must do so before it can release those records and while

also continuing to process records each month. *Id.* This bottlenecking will inevitably cause delay for the Agency's response to other requesters, *see Nat'l Sec. Couns.*, 848 F.3d at 471, and increase the risk of error in productions, not to mention the risk of releasing sensitive security information, to the public's detriment. *See e.g. Protect Democracy Project v. Dep't of Def.*, 263 F. Supp. 3d 293 (D.D.C. 2017) (imposing arbitrary deadline "would run the risk of overburdening" agencies and "could even lead to the mistaken release of protected information"); *Daily Caller*, 152 F. Supp. 3d at 14 ("Requiring the agency to process and produce . . . materials under an abbreviated deadline raises a significant risk of inadvertent disclosure of records properly subject to exemption under FOIA."); *Baker v. Consumer Fin. Prot. Bureau*, Civ. A. No. 18-2403 (CKK), 2018 WL 5723146, at *5 (D.D.C. Nov. 1, 2018) ("Ordering Defendant to process and release documents according to Plaintiff's timeline risks that, in its haste, Defendant will inadvertently release records that fall under a FOIA exception and Congress has decided should not be released").

* * *

CONCLUSION

For the above reasons, the Court should deny Plaintiff's motion to compel a processing rate of 4,000 pages per month and allow the Agency to proceed with processing 300 pages of records per month.

Dated: June 9, 2023

Respectfully submitted,

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