

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

CAMPAIGN LEGAL CENTER,	)	
	)	
	)	
Plaintiff,	)	
v.	)	Case No. 18-cv-1771 (TSC)
	)	
U.S. DEPARTMENT OF JUSTICE,	)	
	)	
	)	
Defendant.	)	
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**JOINT STATUS REPORT**

Pursuant to the Court’s August 31, 2018 Minute Order, Plaintiff Campaign Legal Center (“CLC”) and Defendant United States Department of Justice (“DOJ”) hereby submit this Joint Status Report in this Freedom of Information Act case.

At issue in this Freedom of Information Act (“FOIA”) lawsuit is CLC’s February 1, 2018 FOIA requests to (A) the Justice Management Division (“JMD”) and (B) the Office of the Attorney General (“OAG”) of DOJ for records pertaining to a request by Arthur E. Gary, the General Counsel of JMD, to the Census Bureau to add a citizenship question to the 2020 Census Questionnaire. CLC requested expedited processing because of the “particular urgency to inform the public” about “a matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity that affect public confidence.”<sup>1</sup> OAG granted CLC’s requested for expedited processing on February 9, 2018 and JMD granted CLC’s request for expedited processing on March 14, 2018.

<sup>1</sup> 28 C.F.R. § 16.5(e)(1)(ii), (iv).

**A. Justice Management Division**

During the September 21, 2018 meet and confer between the parties, DOJ informed CLC that JMD had identified approximately 57 pages of responsive documents that it aims to release by October 5, 2018. In addition, JMD has identified other documents that DOJ was still evaluating for release through a referral process to other offices: approximately 170 pages referred to the Office of Information Policy of DOJ, approximately 56 pages referred to the Civil Rights Division of DOJ, and approximately 52 pages that have been or may soon be referred to the Census Bureau at the Department of Commerce. The parties have discussed whether the Office of Information Policy (“OIP”) of DOJ will process the referred records now or after OIP completes its searches for OAG documents, discussed below, and OIP has agreed to process the referred records now.

1. CLC Position:

Given the eight months since the FOIA request was submitted, the almost seven months since the request for expedited processing was granted (acknowledging the particular urgency of the FOIA request), and the small number of documents at issue, CLC respectfully requests that the Court enter an order requiring DOJ to produce the documents already identified for release by October 5, 2018. CLC further requests that the Court enter an order requiring DOJ complete the referral process and produce any additional documents identified for release by October 26, 2018. Accordingly, CLC requests the following dispositive motions schedule:

DOJ’s Motion for Summary Judgment	October 26, 2018
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CLC’s Opposition to DOJ’s Motion for Summary Judgment and Cross-Motion for Summary Judgment	November 16, 2018
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DOJ's Reply in Support of  
Motion for Summary  
Judgment and Opposition to  
CLC's Cross-Motion for  
Summary Judgment

December 7, 2018

CLC's Reply in Support of  
Cross-Motion for Summary  
Judgment

December 21, 2018

2. DOJ Position:

Defendant filed its answer in this case less than one month ago. JMD has already completed its search for responsive records and intends to release all responsive, non-exempt records, other than the records referred to other offices, by October 5, 2018. As for the records referred to the Civil Rights Division, all non-exempt portions thereof have already been provided to Plaintiff in another litigation. JMD is conferring with the final two offices to which records were referred – OIP and the Census Bureau – to determine when the non-exempt portions of the referred documents will be released. Given the substantial progress that JMD has made thus far and the fact that JMD has referred records to an agency that is not a party to this suit, it is premature to set a deadline for the release of records or a schedule for briefing summary judgment. Indeed, it is unclear if, after the conclusion of the document productions, any disputed issues will exist for the Court to resolve at summary judgment. JMD does not intend to withhold any records in full and expects that the vast majority of redactions in the records it releases will withhold email addresses and phone numbers, to which Plaintiff cannot credibly object. It makes little sense to set any briefing schedule at this time, particularly not the extremely expedited schedule proposed by Plaintiff, where there is no understanding of what, if any, issues may or may not need to be

briefed to the Court.

Rather than set a schedule to litigate unknown, hypothetical issues, JMD and the other offices to which records were referred should be allowed an opportunity to complete their productions after which the parties should confer to determine if any disputed issues exist. Particularly given that this case is at a nascent stage, Defendant proposes that the Court decline to set deadlines at this time and instead order the parties to file another joint status report in 21 days to update the Court on the status of the document productions and, if possible, indicate whether the parties foresee any issues to address at summary judgment.

**B. Office of the Attorney General**

During the September 21, 2018 meet and confer between the parties, DOJ informed CLC that OAG has yet to commence its search for responsive documents. It also stated that it recently discovered a technical issue which requires it to rerun searches in response to other FOIA requests and will consequently further delay the commencement of the search in response to CLC's request for at least another three months. DOJ was unable to provide an estimate of the number of responsive documents or an anticipated release date.

1. CLC Position:

CLC cannot accept further unspecified delay in response to a FOIA request that DOJ agreed to process on an expedited basis almost eight months ago. In the intervening time, the urgency of the request has only increased. On March 26, 2018, Secretary of Commerce Wilbur Ross announced his decision to add a citizenship question to the 2020 Census.<sup>2</sup> Secretary Ross made this announcement despite a technical review by Census officials concluding that the change

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<sup>2</sup> Memorandum from Sec'y of Commerce Wilbur Ross to Under Sec'y of Commerce for Econ. Affairs Karen Dunn Kelley on Reinstatement of a Citizenship Question on the 2020 Decennial Census Questionnaire 7 (Mar. 26, 2018) ([https://www.commerce.gov/sites/commerce.gov/files/2018-03-26\\_2.pdf](https://www.commerce.gov/sites/commerce.gov/files/2018-03-26_2.pdf)).

will be “very costly” and “harm[] the quality of the Census count.”<sup>3</sup> The circumstances surrounding Mr. Gary’s request and Secretary Ross’s subsequent announcement of the addition a citizenship question to the 2020 Census have garnered enormous media and public interest, affecting public confidence in the government.<sup>4</sup> DOJ has greatly exceeded statutory deadlines to provide a determination with regard to any responsive documents. While it now claims a technical glitch will further delay the search, it also concedes that this technical issue does not directly affect the requested search. Moreover, this technical issue did not arise until approximately four months after CLC submitted its request and DOJ granted expedited processing. Therefore, CLC respectfully requests that the Court set the following schedule, identical to the one requested above for JMD, to govern dispositive motions. Due to the urgency of the request, CLC anticipates filing its own dispositive motion prior to the below deadlines and would request that the deadline for DOJ’s Opposition be set for 21 calendar days following CLC’s filing (with CLC’s Reply brief due 14 days later).

DOJ’s Motion for Summary Judgment	October 26, 2018
CLC’s Opposition to DOJ’s Motion for Summary Judgment and Cross-Motion for Summary Judgment	November 16, 2018
DOJ’s Reply in Support of Motion for Summary Judgment and Opposition to	December 7, 2018

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3 Memorandum from John M. Abowd, Chief Scientist and Associate Director for Research and Methodology, U.S. Census Bureau, Technical Review of the Department of Justice Request to Add Citizenship Question to the 2020 Census (Jan. 19, 2018) (<http://www.osec.doc.gov/opog/FOIA/Documents/AR%20-%20FINAL%20FILED%20-%20ALL%20DOCS%20%5bCERTIFICATION-INDEX-DOCUMENTS%5d%206.8.18.pdf#page=1289>).

4 See, e.g., Salvador Rizzo, *Wilbur Ross’s false claim to Congress that the census citizenship question was DOJ’s idea*, WASH. POST, July 30, 2018, [http://www.washingtonpost.com/news/fact-checker/wp/2018/07/30/wilbur-ross-false-claim-to-congress-that-the-census-citizenship-question-was-doj-idea/?utm\\_term=.9b77d9164811](http://www.washingtonpost.com/news/fact-checker/wp/2018/07/30/wilbur-ross-false-claim-to-congress-that-the-census-citizenship-question-was-doj-idea/?utm_term=.9b77d9164811); Michael Wines, *Census Bureau’s Own Expert Panel Rebukes Decision to Add Citizenship Question*, N.Y. TIMES, March 30, 2018, <http://www.nytimes.com/2018/03/30/us/census-bureau-citizenship.html>.

CLC's Cross-Motion for  
Summary Judgment

CLC's Reply in Support of  
Cross-Motion for Summary  
Judgment

December 21, 2018

2. DOJ Position:

Defendant has learned of a problem with the data on which some of its FOIA searches were run that stems from the migration of DOJ email onto new servers. Some emails were not migrated onto the new servers and, therefore, searches in certain FOIA cases were conducted against an incomplete collection of some custodians' email records. DOJ is working on the data consolidation and remediation necessary to resolve this technical issue as expeditiously as possible. The affected searches must be run against a complete set of email records, and it is estimated that Defendant should have all affected searches complete by around mid-December. Although this case was not affected by the data migration issue, the technical issue has created delays in the time it will take for the search of the Office of Attorney General in this case to be completed. Defendant is unable to provide a date certain as to when the search will be completed but it likely will be approximately one to three months after the affected searches are complete. Defendant proposes the parties file a further joint status report in 60 days to address the status of the search for documents from the Office of Attorney General.<sup>5</sup>

Defendant believes it is premature to schedule summary judgment briefing at this time. Moreover, under Plaintiff's plainly unreasonable proposed schedule, Defendant would have to perform searches, process a potentially large set of responsive records, prepare a *Vaughn* index for

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<sup>5</sup> Defendant has previously described the technical issue to courts in various other FOIA cases. *See, e.g., Freedom Watch v. Mueller*, No. 18-88 (ES), ECF No. 24-1 (D.D.C.) (attached hereto as Exhibit A).

a potentially large set of withholdings, and draft a summary judgment motion all in less than one month. Even worse, Plaintiff's proposal would involve Plaintiff cutting to the front of the line, ahead of searches already scheduled for numerous other FOIA litigations. Defendant regrets that a technical issue has created delays in its FOIA processing but it is not a solution to prioritize Plaintiff's request at the expense of every other request in the queue. *See Daily Caller v. United States Dep't of State*, 152 F. Supp. 3d 1, 15 (D.D.C. 2015) (acknowledging agency concern that "diverting resources to accelerate processing of the plaintiff's request necessarily will redound to the detriment of other requesters"). Prioritizing Plaintiff's request necessarily means that others are delayed, and Plaintiff has not justified placing its request above all others.<sup>6</sup>

Also, OIP has agreed to review the records referred to it by JMD now instead of waiting to combine those records with the results of its own searches. That decision will allow Plaintiff to receive any non-exempt portions of those records in the near term.

Lastly, Plaintiff notes that it "anticipates filing its own dispositive motion prior to" the proposed summary judgment deadlines. Defendant sees no basis for such a motion given that the production has not yet occurred. Moreover, Defendant is concerned about Plaintiff generating fees through unnecessary work and requiring Defendant and the Court to expend resources responding to and adjudicating Plaintiff's motion, respectively. Defendant believes judicial economy favors delaying all dispositive motions until after the conclusion of the document

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<sup>6</sup> Plaintiff insists that there is an urgent need for access to the records at issue here because Secretary Ross announced his decision to add a citizenship question to the 2020 Census. But the federal government has already released thousands of pages of documents related to that decision. *See, e.g.,* <https://www.brennancenter.org/administrative-record-census-citizenship-question> (containing more than 12,400 pages of records from the Department of Commerce and the Census Bureau from a lawsuit challenging the citizenship question). Likewise, certain documents responsive to Plaintiff's request have already been released to Plaintiff in *Campaign Legal Center v. DOJ*, No. 18-1187 (TSC) (D.D.C.). Plaintiff does not explain how the additional documents sought here are of such public importance that Plaintiff's request should be prioritized over the requests of other plaintiffs, who presumably believe their own requests are important and should be prioritized as well.

productions here.

Proposed orders submitted by CLC and DOJ are included as Exhibits B and C, respectively.

Respectfully submitted,

/s/ Adam Miller

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