

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

THE FOUNDATION FOR GOVERNMENT ACCOUNTABILITY,

Plaintiffs,

v.

Case No. 2:22-cv-00252-JLB-KCD

U.S. DEPARTMENT OF JUSTICE,

Defendants.

Uniform Case Management Report

The goal of this case management report is to “secure the just, speedy, and inexpensive determination of” the action. *See* Fed. R. Civ. P. 1. Under Local Rule 3.02(a)(2), this case management report should be used in all civil cases except those described in Local Rule 3.02(d). Individual judges may have additional case management preferences that can be found under each judge’s name on the Court’s website, flmd.uscourts.gov/judges/all.

1. Date and Attendees

The parties may conduct the planning conference “in person, by telephone, or by comparable means[.]” *See* Local Rule 3.02(a)(1).

Mr. Frank H. Chang for Plaintiff Foundation for Government Accountability (FGA) and Ms. Laurel H. Lum for Defendant U.S. Department of Justice (DOJ) conferred multiple times regarding case management, including: on May 27, 2022 by phone; on June 1, 2022 by email; on June 2, 2022 by phone; on June 2, 2022 by email; on June 7, 2022 by email; on June 13, 2022 by email; on June 27, 2022 by email; on June 29, 2022 by email, on June 30, 2022 by email, and on July 5, 2022 by email.

2. Deadlines and Dates

The parties request these deadlines and dates:

Action or Event	Date
Deadline for providing mandatory initial disclosures. <i>See</i> Fed. R. Civ. P. 26(a)(1).	N/A
Deadline for moving to join a party, <i>see</i> Fed. R. Civ. P. 14, 19, and 20, or amend the pleadings, <i>see</i> Fed. R. Civ. P. 15(a).	N/A
Plaintiff's deadline for disclosing any expert report. <i>See</i> Fed. R. Civ. P. 26(a)(2).	N/A
Defendant's deadline for disclosing any expert report.	N/A
Deadline for disclosing any rebuttal expert report.	N/A
Deadline for completing discovery and filing any motion to compel discovery. <i>See</i> Fed. R. Civ. P. 37; <i>Middle District Discovery</i> (2021).	N/A
Deadline for moving for class certification, if applicable. <i>See</i> Fed. R. Civ. P. 23(c).	N/A
Deadline for filing any dispositive and <i>Daubert</i> motion. <i>See</i> Fed. R. Civ. P. 56. (Must be at least five months before requested trial date.)	<p><u>Plaintiff FGA</u> <u>proposes:</u> <u>U.S. motion for summary judgment:</u> Friday, August 12, 2022</p> <p><u>FGA cross-motion for summary judgment:</u> Friday, August 19, 2022</p> <p><u>Defendant DOJ</u> <u>proposes:</u> <u>U.S. motion for summary judgment:</u></p>

	<p>Friday, February 3, 2023</p> <p><u>FGA cross- motion for summary judgment:</u></p> <p>Friday, February 10, 2023</p>
<p>Deadline for participating in mediation. <i>See</i> Local Rules, ch. 4. Enter mediator’s name, address, and phone number.</p>	N/A
<p>Date of the final pretrial meeting. <i>See</i> Local Rule 3.06(a).</p>	N/A
<p>Deadline for filing the joint final pretrial statement, any motion in limine, proposed jury instructions, and verdict form. <i>See</i> Local Rule 3.06(b). (Must be at least seven days before the final pretrial conference.)</p>	N/A
<p>Date of the final pretrial conference. <i>See</i> Fed. R. Civ. P. 16(e); Local Rule 3.06(b).</p>	N/A
<p>Month and year of the trial term.</p>	N/A

The trial will last approximately 0 days and be

- jury.
- non-jury.

3. Description of the Action

This is Plaintiff Foundation for Government Accountability’s (FGA) action under the Freedom of Information Act (FOIA). FGA seeks the release of public records responsive to the request that FGA submitted to Defendant U.S. Department of Justice (DOJ) on July 30, 2021. The parties currently do not anticipate the need for discovery conducted under the Federal Rules of Civil Procedure.

4. Disclosure Statement

The parties have filed their disclosure statement as required by Federal Rule of Civil Procedure 7.1 and Local Rule 3.03.

5. Related Action

The parties acknowledge their continuing duty under Local Rule 1.07(c) to notify the judge of a related action pending in the Middle District or elsewhere by filing a “Notice of a Related Action.” No notice need be filed if there are no related actions as defined by the rule.

6. Consent to a Magistrate Judge

“A United States magistrate judge in the Middle District can exercise the maximum authority and perform any duty permitted by the Constitution and other laws of the United States.” Local Rule 1.02(a). With the parties’ consent, a district judge can refer any civil matter to a magistrate judge for any or all proceedings, including a non-jury or jury trial. 28 U.S.C. § 636(c).

The Court asks the parties and counsel to consider the benefits to the parties and the Court of consenting to proceed before a magistrate judge. Consent can provide the parties certainty and flexibility in scheduling. Consent is voluntary, and a party for any reason can decide not to consent and continue before the district judge without adverse consequences. *See* Fed. R. Civ. P. 73(b)(2).

The parties do consent and file with this case management report a completed Form AO 85 “Notice, Consent, and Reference of a Civil Action to a Magistrate Judge,” which is available on the Court’s website under “Forms.”

The parties do not consent.

7. Preliminary Pretrial Conference

The parties do not request a preliminary pretrial conference before the Court enters a scheduling order.

The parties do request a preliminary pretrial conference, and the parties want to discuss enter discussion points.

8. Discovery Practice

The parties should read the Middle District Discovery Handbook, available on the Court’s website at fimd.uscourts.gov/civil-discovery-handbook, to understand discovery practice in this District.

The parties confirm they will comply with their duty to confer with the opposing party in a good faith effort to resolve any discovery dispute before filing a motion. See Local Rule 3.01(g); *Middle District Discovery* (2021) at § I.A.2.

9. Discovery Plan

The parties submit the following discovery plan under Rule 26(f)(2):

A. The parties agree to the timing, form, or requirement for disclosures under Rule 26(a):

Yes.

No; instead, the parties agree to these changes: Because this is a FOIA action, the parties currently do not anticipate discovery to be conducted under the Federal Rules of Civil Procedure. Accordingly, the parties believe that initial disclosures are not required.

B. Discovery may be needed on these subjects: The parties currently do not anticipate discovery.

C. Discovery should be conducted in phases:

No.

Yes; describe the suggested phases.

D. Are there issues about disclosure, discovery, or preservation of electronically stored information?

No.

Yes; describe the issue(s).

E. The parties have considered privilege and work-product issues, including whether to ask the Court to include any agreement in an order under Federal Rule of Evidence 502(d).

F. The parties stipulate to changes to the limitations on discovery imposed under the Federal Rules of Civil Procedure and Local Rule 3.04 or other limitations:

No.

Yes; describe the stipulation.

10. Request for Special Handling

The parties do not request special handling.

The parties request special handling. Specifically, this is a FOIA action that should be resolved through a series of productions of responsive, non-exempt records by DOJ and through dispositive motions to resolve whether DOJ properly withheld documents, if any. Therefore, a trial on the merits will not be necessary. Although the parties agree about the general flow of this case, the parties disagree about the schedule.

Plaintiff FGA's statement: In order to ensure DOJ's compliance with FOIA, Plaintiff FGA respectfully requests that the Court (1) set the final production date of **August 5, 2022** and (2) to the extent DOJ invokes any FOIA exemptions, set a reasonably expedited briefing schedule for summary judgment to resolve whether DOJ properly withheld documents.

FOIA requires an agency to make “a determination” within 20 working days, or, at most, 30 working days if there are unusual circumstances. 5 U.S.C. §552(a)(6)(A)(i). To make a determination, the agency must, at minimum, “gather and review the documents” and then specifically “determine and communicate the scope of the documents it intends to produce and withhold.” *Citizens for Responsibility & Ethics in Wash. v. FEC*, 711 F.3d 180, 188 (D.C. Cir. 2013) (Kavanaugh, J.). Following that determination (within, at most, 30 working days), the agency is further required to produce all non-exempt records “‘promptly’”—which “typically” means “within *days or few weeks* of a ‘determination,’ not months or years.” *Id.* (emphasis added).

This Court has the authority to both “supervise the agency’s ongoing progress, ensuring that the agency continues to exercise due diligence in processing the request,” *id.* at 189, and ultimately “enjoin the agency from withholding agency records and to order the production of any records,” 5 U.S.C. §552(a)(4)(B).

DOJ cannot dispute that it is currently flouting FOIA’s demands as it has failed to make a determination—much less communicate that determination or produce the responsive records. DOJ’s disobedience to Congress’s clear commands is especially unacceptable given (1) that it has been *almost a year* since the submission of FGA’s requests, (2) the discrete nature of FGA’s requests, and (3) FGA’s purpose behind seeking the release of the sensitive election-related information prior to the upcoming 2022 mid-term elections.

1. It has been almost a year since FGA submitted its requests on July 30, 2021—far, far past the 20-working-day time-limit imposed on DOJ by FOIA. Yet, DOJ

still has not completed its review; it still has not made a “determination” on which records to produce or withhold; it still has not communicated its determination to FGA; and it still has not produced any records. *See ACLU v. Dep’t of Def.*, 339 F. Supp. 2d 501, 502-03, 505 (S.D.N.Y. 2004) (ordering a production within one month of the order given a similar 11-month delay).

FGA filed its suit in this Court on April 20, 2022. Even then, nearly three months later, DOJ still has not made a determination or make a single production. FOIA, “no less than any other [law], must be duly observed.” *Id.* at 502. “[U]nreasonable delays in disclosing non-exempt documents violate the intent and purpose of FOIA, and the courts have a duty to prevent such abuses.” *Villanueva v. U.S. Dep’t of Jus.*, 2021 WL 5882995, at *3 (S.D. Fla. Dec. 13, 2021) (cleaned up).

2. DOJ’s non-compliance with FOIA is unacceptable especially given the discrete nature of FGA’s requests. All of the documents that FGA seeks are discrete items confined to a relatively small universe of documents, which DOJ has already collected. DOJ’s counsel represented that there are about 5,000 records collected as potentially responsive to FGA’s request—a relatively modest collection of documents in this type of action.

- **Request 1** asks for *one* document—DOJ’s strategic plan created in response to EO14019 that DOJ was required to submit to the White House. *See* Compl. ¶17 (ECF 1); Ex. B, at 1 (ECF 1-2). Unless DOJ is currently openly violating the President’s order, this strategic plan exists and is currently governing how DOJ is implementing EO14019. There is no reason why DOJ cannot produce this *now*.
- **Request 5** also asks for discrete items—communications with Demos, a self-interested advocacy organization that seeks to influence the Administration’s approach to elections. *See* Compl. ¶17; Ex. B, at 1. DOJ could easily search for responsive records by creating targeted searches based on who appear in the To/From line. During various conferences, FGA suggested to DOJ that it could consider searching for documents containing: (1) email domains (@demos.org) or (@demosaction.org) or email domains containing the word "demos"; (2) communications with anyone on Demos's staff (listed here: <https://www.demos.org/about/staff>); and/or (3) anyone introducing themselves as an employee or officer of Demos. Even if DOJ has collected 5,000 records, these searches will quickly narrow the universe of documents to review and process.

- **Requests 2 and 3** similarly ask for a small category of documents (formal notifications to the States about granting DOJ's consent to serve as an NVRA voter registration agency or explanations submitted to the President for declining to do so). *See* Compl. ¶17; Ex. B, at 1. It is probably the case that only a small number of the 50 States have asked DOJ to serve as an NVRA voter registration agency. In any event, if DOJ consented and sent formal notifications, those notifications should be easy to locate and produce. Similarly, if DOJ withheld consent and had to submit its explanations to the White House, as required under EO14019, those should be easy to locate and produce as well.
- **Request 4** is also a targeted and narrow request regarding communications with the White House—it only covers EO14019 and the strategic plan. *See* Compl. ¶17; Ex. B, at 1. Even if DOJ has collected 5,000 records, given the narrow subject matter of this request, DOJ should be able to quickly complete its review.

Given that these topics and requests are discrete, it does not make sense for DOJ to need close to a year (and more) to complete processing these documents. And 5,000 records do not constitute a large collection in relative terms—*especially* given that DOJ has had *nearly a year* since July 30, 2021 to comply with FOIA. In the FOIA context, federal agencies regularly complete reviews of comparable sets of documents on expedited timelines, especially in cases involving egregious delays like here. *See, e.g.*, Minute Order, *Urban Air Initiative, Inc. v. EPA*, No. 1:15-cv-1333-ABJ (D.D.C. Jan. 13, 2016) (ordering EPA to complete the review and production of “more than 15,000 *records*” that are non-exempt within two months of the order (emphasis added)); *ACLU*, 339 F. Supp. 2d at 503, 505 (ordering DOJ to process and produce “between 17,000 and 20,000 pages” of records within one month of the order); *Clemente v. FBI*, 71 F. Supp. 3d 262 (D.D.C. 2014) (observing that the court “has ordered the FBI to process 5,000 *documents* per month” (emphasis added)); *Villanueva*, 2021 WL 5882995, at *4 (ordering DOJ to “process the 20,500 pages of withheld documents ... at a rate of 5,125 pages per month” and complete review within four months). Here, it has been almost a year since FGA’s initial FOIA request and more than three months since the filing of FGA’s suit. FOIA does not tolerate this kind of processing delay. *See ACLU*, 339 F. Supp. 2d at 503 (agreeing with plaintiffs’ argument that “the long delays they already had experienced and the law’s command for prompt disclosure” required “a more expeditious schedule”).

3. Furthermore, DOJ’s violation of FOIA is especially unacceptable, because FGA's requests concern matters of significant public interest. *See* Compl. ¶16; Ex.

A (ECF 1-1). EO14019 concerns a massive expansion of federal agencies' role in administering elections that constitutionally belong to the States. Unsurprisingly, the implementation of EO14019—by agencies like DOJ—has raised concerns with many members of Congress as well as various state officials. These officials have been seeking documents similar to those that FGA seeks through its FOIA requests and/or demanding scrapping the entire EO14019 regime. *See, e.g.*, Ex. A, at 2; Lt'r from W. Va. Sec'y of State Mac Warner to President Joseph R. Biden (May 4, 2022), https://sos.wv.gov/news/Documents/Ltr_Biden_EO14019.pdf.

Obviously, EO14019 concerns the integrity of our elections. With the 2022 midterms elections fast approaching, FGA needs the documents that it requested no later than September to meaningfully make use of the documents, educate the public regarding DOJ's implementation of EO14019, and unearth any improper influence that outside groups may be asserting over federal policies *prior to the 2022 elections*. *See, e.g., Am. Oversight v. U.S. Dep't of State*, 414 F. Supp. 3d 182, 187(D.D.C. 2019) (issuing a preliminary injunction ordering the agency to produce documents that “could directly inform the present [impeachment] investigation and the surrounding public debate” within a month of the order).

* * *

In light of the foregoing, FGA respectfully requests that the Court set the following schedule.

Date	Deadline
Friday, July 15, 2022	DOJ shall produce the strategic plan responsive to FGA's Request 1.
Friday, July 22, 2022	DOJ shall produce all documents responsive to FGA's Request 5 (e.g., communications with Demos).
Friday, August 5, 2022	DOJ shall produce all documents responsive to FGA's Requests 2, 3, and 4 (e.g., documents relating to DOJ's consent and communications with the White House). To the extent that DOJ seeks to invoke any applicable FOIA exemptions, it must produce a sufficiently detailed <i>Vaughn</i> index by August 5, 2022.
Wednesday, August 10, 2022	The parties shall file a joint status report regarding whether they have remaining disputes and anticipate needing to resolve the remaining disputes through summary judgment motions.
Friday, August 12, 2022	If applicable, DOJ shall file a summary judgment motion justifying the withholding of any records or the redactions.

Friday, August 19, 2022	If applicable, FGA shall file a combined response to DOJ's summary judgment motion and a cross-motion for summary judgment.
Friday, August 26, 2022	If applicable, DOJ shall file a combined response and reply.
Friday, September 2, 2022	If applicable, FGA shall file a reply.
Friday, September 9, 2022	FGA's requested date for resolution of the pending summary judgment motions.
Friday, September 16, 2022	DOJ shall produce all records as required by the Court's order.

Defendant DOJ's statement:

DOJ has located approximately 5,500 records that are potentially responsive to FGA's FOIA request. For the sake of efficiency, DOJ processes these records by first conducting a responsiveness review, then completing more detailed review of the smaller subset of responsive records, and then producing any responsive, non-exempt records. Under this responsiveness-first review framework, DOJ has offered FGA a generous processing rate of over 1,000 records per month, which is more than double the typical processing schedule set by courts in the District of Columbia, where most FOIA cases are filed. *See, e.g., Daily Caller News Found. v. Fed. Bureau of Investigation*, 387 F. Supp. 3d 112, 121 (D.D.C. 2019) ("find[ing] no reason . . . to vary from the FBI's policy of processing 500 *pages* per month, which will result in a processing schedule spanning 14 months") (emphasis added); *Freedom Watch v. Bureau of Land Mgmt.*, 325 F. Supp. 3d 139, 140 (D.D.C. 2018) (noting that the court had adopted the FBI's processing schedule of 500 *pages* per month despite the resulting projected production end date of approximately 500 months); *Middle E.F. v. U.S. Dep't of Homeland Sec.*, 297 F. Supp. 3d 183, 187 (D.D.C. 2018) (approving a processing rate of 500 *pages* per month where that rate would conclude the processing in approximately seven months and the plaintiff "ha[d] not provided reasons that its requests should take precedence over the duly-made FOIA requests of others"); *Energy Future Coal. v. Off. of Mgmt.*, 200 F. Supp. 3d 154, 163 (D.D.C. 2016) (approving a processing rate of 500 records per month).

DOJ's proposed processing rate of over 1,000 records per month would allow DOJ to conclude its responsiveness review by November 1, 2022, and to complete the processing and production of any responsive, non-exempt documents by **January 1, 2023**.

Any processing rate beyond this proposed rate of over 1,000 records per month would put an undue strain on agency resources, as DOJ is currently processing many

other FOIA requests and, absent expedition, is required to process on a first-in, first-out basis. DOJ's Civil Rights Division's FOIA Office, which is handling FGA's FOIA request, is comprised of three attorneys and five administrative professionals. The three full-time attorneys are dedicated to not only this case, but also eleven other active FOIA litigations, encompassing the review of well over 50,000 pages. In addition, Plaintiff has requested that final productions be made by August 5, 2022. If that request is granted, the workload of the Civil Rights Division's FOIA Office will be significantly increased, which would impact the ability of the Department to timely comply with the agreed court production schedules, timely submission of *Vaughn* indexes, and responses in the other lawsuits. Some of the active cases include: *America 1st Legal Foundation v. Coley, et. al.*, 21-cv-03024 (D.D.C.), *American Oversight v. DHS, et. al.*, 21-cv-3280 (D.D.C.), *Georgia v. DOJ*, 21-cv-3138 (D.D.C.), *Judicial Watch v. DOJ*, 21-cv-02462 (D.D.C.), *Leopold v. DOJ, et al.*, 21-cv-0558 (D.D.C.), *Leopold v DOJ, et al.*, 21-cv-00786 (D.D.C.), *Miller v. DOJ*, 22-cv-188 (W.D. TX.), *Phillips v. DHS and DOJ*, 18-cv-0381 (D.D.C.), *State of Indiana v. Biden, et. al.*, 22-cv-430 (S.D. IN.), *The Transparency Project v. DOJ*, 21-cv-121 (E.D. TX.), *CatholicVote Civic Action & Judicial Watch Inc. v. DOJ*, 22-cv-00291 (DDC).

If, instead, FGA prefers to receive rolling productions of any responsive, non-exempt records, the process will be slower. DOJ has offered a processing rate of 250 records per month under such an approach, with an estimated production end date of June 2024.

DOJ is not able to individually process each aspect of FGA's FOIA request as FGA suggests, as it is not possible for the agency to determine with certainty which of the portions of the request a record is responsive to until DOJ has fully reviewed the contents of that record.

DOJ proposes the following schedule:

Date	Deadline
Tuesday, November 1, 2022	DOJ shall conclude its responsiveness review of the approximately 5,500 records that are potentially responsive to FGA's FOIA Request.
Friday, December 30, 2022	DOJ shall produce all responsive, non-exempt documents responsive to FGA's FOIA Request 5.
Friday, January 6, 2023	The parties shall file a joint status report regarding whether they have remaining disputes and anticipate needing to resolve the remaining disputes through summary judgment motions.
Friday, February 3, 2023	If applicable, DOJ shall file a summary judgment motion justifying the withholding of any records or the redactions.

	DOJ shall also file a <i>Vaughn</i> index. <i>See, e.g., Cappabianca v. Comm’r, U.S. Customs Serv.</i> , 847 F. Supp. 1558, 1563 (M.D. Fla. 1994) (<i>Vaughn</i> index submitted with motion for summary judgment).
Friday, February 10, 2023	If applicable, FGA shall file a combined response to DOJ’s summary judgment motion and a cross-motion for summary judgment.
Friday, February 17, 2023	If applicable, DOJ shall file a combined response and reply.
Friday, February 24, 2023	If applicable, FGA shall file a reply.

11. Certification of familiarity with the Local Rules

The parties certify that they have read and are familiar with the Court’s Local Rules.

12. Signatures

Dated: July 5, 2022

/s/ Laurel H. Lum

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Respectfully Submitted,

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