

VIA CM/ECF

February 24, 2025

Honorable Alex G. Tse
United States Magistrate Judge
San Francisco Courthouse, Courtroom A – 15th Floor
450 Golden Gate Avenue, San Francisco, CA 94102

Re: Law v. Federal Bureau of Prisons, Case No. 4:24-cv-06628-YGR

Dear Judge Tse,

Pursuant to Civil Standing Order Paragraph VII.B and Dkt. No. 30, which notes “this matter was recently referred for discovery, including for document production issues” and instructed the parties to submit a joint statement, Plaintiff Victoria Law (“Plaintiff”) and Defendant Federal Bureau of Prisons (“Defendant”) submit this joint letter brief and index documenting the status of production. *See* Ex. 1, Production Status Index. In addition, Defendant provides a declaration from Kara Christenson, a Supervisory Government Information Specialist, with an office at the Federal Bureau of Prisons’ Federal Medical Center Rochester. She is assigned to this litigation. *See* Ex. 2, ¶ 1. This filing is current as of the January 24, 2025 release. BOP provided Plaintiff with a third release on February 21, 2025. Plaintiff provided Defendant a draft letter brief on the third release on February 24, 2025. Defendant does not believe this draft letter brief raises any new legal issues, but will meet and confer about the third and subsequent releases of documents. The Honorable Judge Gonzalez Rodgers referred the parties to this Court for “discovery including document production issues.” Dkt. No. 29. This is a FOIA case in which BOP granted expedited status. The case is at the disclosure stage. There is no case management order. Discovery has not opened. During regular meet and confers, the parties clarified and defined certain terms. Counsel met and conferred by videoconference in good faith before filing the joint statement and were unable to resolve the issues described herein.

Dated February 24, 2025

Respectfully submitted

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Plaintiff Victoria Law's Statement

This is a FOIA case in which BOP granted expedited status on July 10, 2024. The case is at the disclosure stage and does not have a case management order. Plaintiff seeks an order (“Disclosure Order” or, in the alternative, a “Discovery Order”) requiring Defendant to:

- a. Release in their entirety, unredacted versions of each responsive record that is not exempt from disclosure as an individual record in its native format, retaining its unique file characteristics, name, and metadata in the past productions, and future productions;
- b. Produce at least 5,000 deduplicated pages every four weeks;
- c. File monthly status reports about what it released and withheld, and on what basis;
- d. Expedite proceedings in this action pursuant to 28 U.S.C. § 1657; and FRCP 12(a)(2); and
- e. Prepare an index pursuant to *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

Factual Background- There are three main issues: 1. Is BOP acting pursuant to its obligation to expedite; 2. Is BOP's search adequate; and 3. Is BOP acting in bad faith?

Issue 1: Is BOP Acting Expeditiously? There is a factual dispute regarding whether BOP is acting expeditiously to prevent harm. At BOP's proposed rate of **processing** 1,000 pages every 4 weeks, **processing** item 1 (80,000 pages of email) of 48 remaining items could take over 6.7 years to process, much less release. Depending on the removal of duplicates, Plaintiff's proposed rate of **releasing** 5,000 pages every 4 weeks, email production alone could take over 1.3 years. There are 48 other items pending without page or time estimates. The “value of information is partly a function of time.” *Fiduccia v. U.S. Dep't of Justice*, 185 F.3d 1035, 1041 (9th Cir. 1999). These records have a particular value that will be lost if not disseminated quickly. Journalist Law urgently requires the requested records to inform the public, as the BOP is currently facing intense media scrutiny on an issue of enormous public concern. *See* Complaint, *Dkt.* No. 1-1. Any delay is effectively a denial, which courts recognize constitutes harm. Reporting could influence Congressional oversight, and pending cases related to immigration, compassionate release, and civil rights, and prevent harm or loss of life. Over-incarceration could be prevented by ending incorrect applications of FSA and Good Time credits.

Issue 2: Has BOP Met Its Burden to Prove the Search Is Sufficient? There is a factual dispute regarding whether BOP is meeting its burden of proving that it conducted a reasonable search. Other than an agreement about the email search, the Production Status Index, and one Declaration, the BOP has neither explained which locations or databases it will search with what terms and when, nor estimated the number of responsive records.

Issue 3: Is BOP Acting in Bad Faith? “Even where there is no evidence that the agency acted in bad faith with regard to the FOIA action itself there may be evidence of bad faith or illegality with regard to the underlying activities which generated the documents at issue. Where such evidence is strong, it would be an abdication of the court's responsibility to treat the case in the standard way...” *Jones v. F.B.I.*, 41 F.3d 238, 242–43 (6th Cir. 1994) (court processing records about FBI's illegal COINTELPRO activity differently than routine agency investigation). A “court's review in a FOIA case is difficult because ‘the party seeking disclosure does not know the contents of the information sought and is, therefore, helpless to contradict the government's description of the information or effectively assist the trial judge.’” *Hronek v. DEA*, 16 F. Supp. 2d 1260 (D. Oregon 1998) (quoting *Davin v. DOJ*, 60 F.3d 1043, 1049 (3d. Cir. 1995).) When, as here, the agency maintains sole access to the complete universe of facts and documents, “the underlying facts and possible inferences are construed in favor of the FOIA requester.” *L.A Times Commc'ns, LLC v. Dep't of Army*, 442 F. Supp. 2d 880, 894 (C.D. Cal. 2006) (citations omitted); *See also Wiener v. FBI*, 943 F.2d 972, 977 (9th Cir. 1991). The subject of this FOIA is related to

BOP staff crimes and civil rights violations. In response to the FOIA, BOP's actions evidence a pattern of improprieties and obstructive behavior that also undermines Ms. Law's rights. The BOP is engaging in **delays**: it failed to meet FOIA's deadline to make a determination and produce records; it canceled six meets and confers; it postponed its Answer twice; it agreed to produce records every four weeks then immediately breached its agreement, producing seven days late. On 2/7/25 immediately after meeting, Plaintiff transmitted a letter brief draft. Defense provided its draft 17 days later, on 2/24/25. BOP's production is **incomplete** and **insufficient**. Plaintiff asked for release "in chronological order, from the most pressing for remedying harm to life and liberty interests, to the least pressing." Complaint *Dkt.* No. 1-1. On 12/20/24 it released a 568-page PDF of seemingly already public disposal schedules, prioritized 44/50. On 1/24/25, it released a 51-page PDF that summarized 37 grievances and immigration detainers. BOP's **alteration** of records makes them less useful. Ms. Law requested records "preserved in the native format with metadata." BOP merged individual files into one PDF, stripping each file of metadata, native formatting, and titles. By renaming and consolidating over 170 separate files, BOP made it difficult to parse and cross-validate the data. The second release merged an export of content seemingly from one database that contained grievances and one that contained immigration detainers. Altering files from the ordinary course of business into a new format that eliminates titles, pagination, structures, and more, makes the records less functional, unnecessarily prolongs the review process, increases the costs of litigation, obstructs Plaintiff, and evidences bad faith.

Plaintiff is Entitled to A Production Order – In FOIA cases it is common for courts to order a production schedule. A Court has jurisdiction and power to grant any and all necessary equitable or injunctive relief when an agency improperly delays the production of records. 5 U.S.C. § 552 (a)(4)(B) (providing "jurisdiction to enjoin the agency from withholding agency records and to order the production of" improperly withheld records); *Elec. Privacy Info. Center v. Dep't of Justice*, 416 F. Supp. 2d 30, 35 (D.D.C. 2006) ("*EPIC*") ("FOIA imposes no limits on courts' equitable powers in enforcing its terms and unreasonable delays in disclosing non-exempt documents violate the intent and purpose of the FOIA, and the courts have a duty to prevent [such] abuses.") (internal cites and quotes omitted). In this expedited case, "relevant case law establishes that courts have the authority to impose concrete deadlines on agencies that delay the processing of requests meriting expedition." *Id.* at 38. *See also Clemente v. F.B.I.*, 71 F. Supp. 3d 262, 269 (D.D.C. 2014) (A court "may use its equitable powers to require the agency to process documents according to a court-imposed timeline."); *Spurlock v. F.B.I.*, 69 F.3d 1010, 1016 (9th Cir. 1995) ("A district court possesses inherent power over the administration of its business[,] including the "inherent authority ... to promulgate and enforce rules for the management of litigation ..."). As the format in which a record is produced can affect the integrity and utility of the record itself, Plaintiff requests a production schedule that addresses deadlines, substance, and format. "When an agency already creates or converts documents in a certain format...requiring that it provide documents in that format to others does not impose an unnecessarily harsh burden, absent specific, compelling evidence as to significant interference or burden." *TPS, Inc. v. United States Department of Defense*, 330 F.3d 1191, 1195 (9th Cir. 2003). *See also Scudder v. CIA*, 25 F. Supp. 3d 19, 43 (D.D.C. 2014) (Where documents exist in the requested format in an agency's system and "would require no conversion to a different format to comply with the plaintiff's format request, the records should be plainly 'readily reproducible.'"). Plaintiff diligently raised issues with the Courts and requested relief. However, since no enforceable orders have been issued, Plaintiff lacks assurance that she will be able to obtain the records within the expedited

timeline. Accordingly, Plaintiff requests a discovery management conference and a sanctions-enforceable disclosure order requiring the production of records in the requested format on an expedited timeline.

In the Alternative, Plaintiff Requests a Discovery Order - If this Court finds bad faith, Plaintiff requests discovery to further examine the three enumerated factual issues. Ordering discovery is within this court's domain “[i]t is beyond question that discovery is appropriate and often necessary in a FOIA case.” *Murphy v. F.B.I.*, 490 F. Supp. 1134, 1136 (D.D.C. 1980) (noting discovery is ordered in FOIA regarding factual disputes such as whether the agency engaged in a good-faith search and indexed documents). *See also Laws.’ Comm. for Civ. Rts. of S.F. Bay Area v. U.S. Dep’t of the Treasury*, 534 F. Supp. 2d 1126, 1131-32 (N.D. Cal. 2008) (discovery appropriate in FOIA when an agency has not taken adequate steps to uncover responsive documents). Discovery can be ordered if Plaintiff “make[s] a showing of bad faith on the part of the agency sufficient to impugn the agency's affidavits or declarations, or provide[s] some tangible evidence that an exemption claimed by the agency should not apply or summary judgment is otherwise inappropriate.” *Laws.’ Comm.*, 534 F. Supp. 2d at 1132 (citing O’Reilly, *Federal Information Disclosure* § 8:20 (2007 Supp.)). In determining a case’s discovery needs, the court “consider[s] ...the parties' relative access to relevant information.” *Id.* Furthermore, a Ninth Circuit court has found discovery necessary in a BOP FOIA case. *See Raher v. Fed. Bureau of Prisons*, No. 09-CV-526-ST (D. Or. July 9, 2012). Here, the significant informational asymmetry between Ms. Law and the BOP favors discovery, as BOP has an effective monopoly on the relevant information related to factual disputes and has obstructed Ms. Law’s access to it.

Defendant Federal Bureau of Prisons’ Statement

BOP has limited FOIA resources.

BOP currently has a total of twenty-two FOIA staff; on February 28, 2025, three FOIA staff are retiring including the FOIA Chief. Christenson Dec. ¶5. Of the remaining nineteen staff, nine (one supervisor and eight Government Information Specialists (“GIS”)) are assigned to the Administrative and Intake Team (“AIT”). *Id.* Two staff on the AIT are new hires and in training and one is retiring in May 2025. *Id.* The AIT is responsible for receiving and evaluating all FOIA requests sent to BOP to determine appropriate courses of action. *Id.* AIT rarely processes FOIA requests as that is not their main area of responsibility; AIT staff handles a process outside of FOIA to assist attorneys who submit requests for their clients’ medical records in support of motions for compassionate release and requests for home confinement. *Id.* & ¶ 4.

Of the remaining ten staff, eight are assigned to the Processing and Litigation Team (“PLT”), which Ms. Christenson supervises. *Id.* ¶ 5. Of the seven GISs, three are new hires and in training. *Id.* The PLT is responsible for the actual processing of all records responsive to BOP FOIA requests. *Id.* Processing includes page by page, line by line reviews of every document. *Id.* When information is identified as exempt from release, the PLT applies the appropriate exemption(s) and upon review of all records, prepares a determination letter which identifies the scope of the records, status of the records (number released in full, etc.), any exemptions applied and appeal rights to the Office of Information Policy of the Department of Justice. *Id.* PLT makes the production of the records and the determination letter to the requester. *Id.* Assistance also includes meeting court ordered production schedules and assisting in drafting declarations and *Vaughn* indexes. *Id.* As of March 1, 2025, in addition to her supervisory duties of the PLT, Ms. Christenson will be the Acting FOIA Chief for an indefinite period of time. *Id.* The remaining two staff are agency counsel for FOIA litigation. *Id.* Because of the hiring freeze impacting all Executive Branch agencies, BOP will be unable to replace the recently retired staff in the near future. *Id.* In a year with 5,000 FOIA requests, that would average 625 requests per each of the eight staff members of the PLT. *Id.* In

fact, BOP receives between 6,695 and 4,403 FOIA requests per fiscal year. *Id.* ¶ 3.

The Court should not order the release of 5,000 pages per month.

As of February 19, 2025, BOP has over 6300 open requests with 6099 currently backlogged. Christenson Dec. ¶ 6. Plaintiff's request is 5028 out of the 6395 open requests. *Id.* In order to reach the 5000 deduplicated pages per month Plaintiff is requesting, the 5027 requests older than Plaintiff's request would have to be placed on an indefinite hold as the majority of the PLT's limited resources would have to be devoted to processing records to meet Plaintiff's 5000 deduplicated page production request. *Id.* While it would strain resources, BOP could *process* 1000 pages each month. *Id.* Processing 1000 pages does not necessarily equate to production of 1000 pages. Christenson Dec. ¶ 2. The pace proposed by BOP is more than the rate for the other three cases in litigation; there are two cases where BOP is required to process 500 pages per month, and one where BOP is required to produce 300 pages per month. *Id.*

BOP disagrees with the contention that releasing 5,000 pages monthly is reasonable, as judges set lower rates of production in this district. *See, e.g., Swords to Plowshares v. U.S. Dep't of Veterans Affairs*, No. 3:20-cv-07146-JSC, ECF No. 31 (March 19, 2021) (600 pages); *USRTK v. U.S. Dep't of Education*, No. 20-cv-09117-DMR, ECF No. 21 (750 pages); *Cohdoes v. U.S. Dep't of Justice et al.*, 3:20-cv-4015, ECF No. 78 (500 pages).

Plaintiff claims time is of the essence for her client. Plaintiff does not represent any of the individuals formerly incarcerated at Dublin. The lawyers that represent the class were able to reach a consent decree in *CCWP* without the need for FOIA documents to either represent the class or settle the case. A simple google search about the former Dublin prison would show thousands of news stories across all forms of media. None of the journalists covering the former Dublin prison needed the documents Plaintiff seeks to report on the story. Plaintiff herself has published numerous articles without needing the documents.

As a final point, BOP anticipates providing another release of records the week of March 3, 2025, and again on or about March 24, 2025.

BOP can release documents in native format, but it will be time consuming.

BOP agrees to release documents in native format with metadata to the extent required by FOIA or Ninth Circuit law *if the record is readily reproducible by the agency in that form or format.*" 5 U.S.C. § 552(a)(3)(B) (emphasis added). As the statute makes clear, an agency is not always required to produce a document in native format. BOP's release of 568 pages of records on December 20, 2024, was provided in native format, as these documents were downloaded from PDFs from the National Archives website. Christenson Dec. ¶7. While BOP's second release did include print outs from various databases which were released together, the cover letter identified the applicable redaction codes; the redactions were clearly marked on each page containing redactions, and it was easy to see which record was which. *Id.* The second release was also made in native format, as the Sentry database results automatically convert to PDFs upon downloading so results cannot be produced in any other manner. *Id.* When responsive records are located and uploaded into the FOIAXpress database for processing, the system automatically combines documents into one large file, even if each document was initially uploaded individually. *Id.* The only way to ensure individuality of records is to create a folder in the database for each document and upload the document to its respective folder one at a time. *Id.* Even if an individual folder was created for each document, the only way to ensure separation of each document for production is to also download and save it individually. *Id.* To be clear, different categories of responsive records are separated into individual folders in the database for organization. *Id.* However, creating separate folders, downloading and saving separate folders for each and every individual record *would increase processing time tenfold.*"

Id. (emphasis added). BOP urges the Court to consider this increase in processing time to not order BOP to process more than 1000 pages per month.

The Court should not order a *Vaughn* index or monthly status reports.

As an initial matter, a *Vaughn* index is not required in every FOIA case. *Fiduccia v. U.S. DOJ*, 185 F.3d 1035, 1042-43 (9th Cir. 1999) (“[O]ur precedents plainly hold that neither a *Vaughn* index nor an affidavit is necessarily required in all cases, though either or both (or more, as when a judge requires an in camera review) may be required in any particular case, depending on the circumstances.”); *Minier v. CIA*, 88 F.3d 796, 804 (9th Cir. 1996) (“[W]hen the affidavit submitted by an agency is sufficient to establish that the requested documents should not be disclosed, a *Vaughn* index is not required.”). More importantly, courts deny motions for a *Vaughn* index filed before the government’s summary judgment motion and supporting papers have been filed. *See Pyne v. Commissioner of Internal Revenue Service*, No. 98-00253 HG, 1999 WL 112532, *2-3 (D. Hawaii Jan. 6, 1999) (denying motion for *Vaughn* index because it was premature when the government had not filed its motion and supporting declarations); *Ioane v. Commissioner of Internal Revenue Service*, No. 3:09-CV-00243-RCJ, 2010 WL 2600689 *6-7 (D. Nev. March 11, 2010) (same).

As a factual matter, “each document production includes a determination letter identifying the portion of the request the records are responsive to; the total number of pages processed, released in full, released in part, withheld in full, identified as duplicative; and the exemptions applied.” Christenson Dec. ¶ 9. “While perhaps not as detailed as a *Vaughn* index, each determination letter provides Plaintiff a general accounting and status of the records sufficient to track progression of production so BOP can focus its limited resources on continued gathering, processing and producing documents.” *Id.*

Plaintiff’s request for a *Vaughn* index and monthly status reports identifying what is being withheld, and why, would be counterproductive. BOP should be allowed to focus on gathering and releasing records given its limited resources. Indeed, it is unclear what Plaintiff wants in a monthly status report as identifying what is being withheld, and why” appears to be a request for a *Vaughn* index by another name. *See Fiduccia*, 185 F.3d at 1043 (purpose of *Vaughn* index or affidavit so the requester knows “what has not been produced and why”).

The Court should not allow any discovery.

Discovery is generally not appropriate in FOIA actions. *See Lane v. Department of Interior*, 523 F.3d 1128, 1134 (9th Cir. 2008) (noting that discovery is limited in FOIA cases “because the underlying case revolves around the propriety of revealing certain documents”). Plaintiff’s cases confirm that the Court should not allow any discovery at this time. *Murphy v. F.B.I.*, 490 F. Supp. 1134, 1136 (D.D.C. 1980) denied Plaintiff’s request for discovery because the cases “establish a self-evident principle: a factual issue can arise only after the government files its affidavits and supporting memorandum of law,” namely after the government moves for summary judgment. Discovery is not appropriate at this time. Plaintiff’s reliance on *Laws. Comm. for Civ. Rts. of S.F. Bay Area v. U.S. Dep’t of the Treasury*, 534 F. Supp. 2d 1126, 1131-32 (N.D. Cal. 2008) is also misplaced, as the court denied plaintiff’s motion for discovery because it sought information “beyond merely investigating [the agency’s] search for responsive documents, and plaintiff’s motion for discovery, consistent with *Murphy* was filed during summary judgment. Plaintiff’s own cases dictate that the Court should not allow discovery.