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7 **UNITED STATES DISTRICT COURT**  
8 **NORTHERN DISTRICT OF CALIFORNIA**  
9 **OAKLAND DIVISION**

10 VICTORIA LAW,  
11 PLAINTIFF,  
12 vs.  
13 FEDERAL BUREAU OF PRISONS,  
14 DEFENDANT.

CASE No.: 4:24-cv-06628-YGR

**PLAINTIFF’S REPLY ON MOTION FOR  
PARTIAL JUDGMENT ON THE PLEADINGS,  
DECLARATORY JUDGMENT**

HON. YVONNE GONZALEZ ROGERS  
COURTROOM NUMBER: 1  
DATE & TIME OF HEARING: SEPTEMBER 30,  
2025

17 **I. INTRODUCTION**

18 At Judge Tse’s direction, Plaintiff submitted this Motion for Judgment on the Pleadings and  
19 Declaratory Judgment related to FOIA violations which Judge Tse stated lie beyond the scope of his  
20 discovery referral: failure to conduct a complete search, failure to issue timely determinations, improper  
21 withholding of records, failure to process Plaintiff’s expedited request as required, failure to promptly  
22 release responsive records, unlawful withholding of agency records as part of a broader pattern and  
23 practice of delay, failure to provide records in the requested format, and failure to demonstrate  
24 exceptional circumstances or due diligence in responding, thereby depriving the Court of its  
25 discretionary authority under the statute. BOP contends that, despite Judge Tse's instruction, Plaintiff  
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1 may not raise statutory violations until summary judgment, while it continues to withhold the  
2 information needed to file such a motion. If BOP is permitted to proceed this way, refusing to define  
3 scope, failing to issue a determination, and producing records in noncompliant formats, Plaintiff will be  
4 forced to wait for six years (the time that BOP predicts for completion of its review), at which point the  
5 court would have to order corrections ex post facto, requiring BOP to reprocess and reissue years of  
6 noncompliant releases. All while Plaintiff and the public lose the time-sensitive value of information  
7 about a high-profile abuse scandal currently being litigated and under which people see relief from  
8 imprisonment and immigration proceedings. BOP has, in essence, weaponized its own statutory  
9 violations.  
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12 FOIA's statutory framework and its "promptly available" requirement were designed precisely  
13 to avoid this trap. By requiring agencies to issue a determination within 20 working days and to process  
14 expedited requests "as soon as practicable," Congress sought to ensure that requesters would not have to  
15 wait years for lawful productions, nor would courts have to mop up sprawling compliance failures after  
16 the fact. Telling a requester "you'll get the documents 15 years from now" is tantamount to denial. *See*  
17 *Fiduccia v. DOJ*, 185 F.3d 1035, 1041 (9th Cir. 1999); *Open America v. Watergate Special Prosecution*  
18 *Force*, 547 F.2d 605, 617 (D.C. Cir. 1976) ("[E]xcessive delay by the agency in its response is often  
19 tantamount to denial."); *Gilmore v. U.S. Dep't of Energy*, 33 F. Supp. 2d 1184, 1187 (N.D. Cal. 1998).  
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21 By contrast, addressing BOP's statutory violations now ensures that future releases comply with FOIA,  
22 preserving their value for the public and preventing wasteful duplication of effort.  
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25 While Plaintiff's Motion for Judgment on the Pleadings addresses statutory violations apparent  
26 on the face of Defendant's Answer, the need for declaratory judgment arises from Defendant's  
27 continuing pattern and practice of noncompliance after the pleadings were closed. As noted by Judge  
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1 Tse, these ongoing violations fall outside the scope of the limited discovery referral and require Article  
2 III adjudication. Plaintiff’s Motion is not a challenge to discovery procedure, but the substance of BOP’s  
3 past and ongoing violations of FOIA.  
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## 5 **II. ARGUMENT**

### 6 **A. BOP FOIA Violations Are Properly Before This Court**

7 BOP’s reliance on Rule 72(a) arguments is misplaced. The text of Rule 72 (as BOP recognizes)  
8 governs objections to *nondispositive* orders and is inapplicable to the Motion. ECF No. 47 at 4:1-14.<sup>1</sup> It  
9 does not bar this Court from adjudicating statutory claims that Magistrate Tse indicated Plaintiff should  
10 bring before this court. Plaintiff’s Motion properly invokes FOIA’s remedial framework under 5 U.S.C.  
11 § 552(a)(4)(B), not discovery procedure. Rule 72(a) does not strip this Court of its authority to  
12 adjudicate statutory violations under FOIA. Plaintiff’s Motion seeks declaratory and substantive relief  
13 on her FOIA claim, which goes beyond the scope of a discovery order. This Court must address whether  
14 ongoing delays and refusal to release records in usable formats violate FOIA.  
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17 Magistrate Judge Tse made clear that the issues in this Motion fall outside his referral and must  
18 be decided by this Court. He explained that his role was limited to facilitating production. He  
19 emphasized that determinations about deadlines, defenses (which BOP subsequently waived in the  
20 hearing), and withholdings all belong before this Court: “the relief...that the Plaintiff seeks really first  
21 requires that I find that there be some violation of FOIA and that — before we get to the productions and  
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25 <sup>1</sup> BOP cites *Baker v. Ensign* for the proposition that an untimely objection under Rule 72(a) forecloses  
26 relief. Baker involved a party explicitly challenging three discovery-related orders in a non-FOIA false  
27 arrest case under Rule 72(a). See *Baker v. Ensign*, No. 11-CV-2060-BAS WVG, 2014 WL 4055353, at  
28 \*1 (S.D. Cal. Aug. 14, 2014). That posture is distinct from the present case. Plaintiff is not appealing  
Judge Tse’s discovery rulings under Rule 72. Rather, as Judge Tse instructed, Plaintiff brings this  
motion to resolve statutory FOIA violations that fall outside the scope of the discovery referral.

1 so forth, which is all an appropriate request. *It's just that that's not my role.* My role isn't to determine  
 2 whether or not FOIA has been violated . . . That is a role reserved for the district court judge here.")  
 3 ECF No. 43 Tr. 2:14-25 (emphasis added).<sup>2</sup> Judge Tse said could not rule on BOP's (now waived)  
 4 defense. *Id.* Tr. 12:18-21 ("So any defense to the FOIA violation . . . is also something that I don't  
 5 adjudicate for you in this instance. That's not the posture of my role here."). Tse explained that he could  
 6 not resolve the issues related to BOP's failure to issue a determination letter because they go to the  
 7 FOIA's merits: "The question is, who can order her to get that relief? I don't think I can because it goes  
 8 into the merits of FOIA." *Id.* Tr. 40:1-2. Plaintiff now seeks rulings on BOP's compliance with FOIA  
 9 through judgment on the pleadings for violations apparent at the time of the Answer, and declaratory  
 10 relief for the continuing pattern since, where BOP failed to: 1) complete an adequate search; 2) issue a  
 11 determination; 3) make records "promptly available"; and 4) process the request "as soon as  
 12 practicable."  
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16 **B. No Dispute of Material Fact Exists as to BOP's FOIA Violations: BOP's Failure to**  
 17 **Timely Search, Determine, Expedite, or Release in BOP's Answer Warrant Partial**  
 18 **Judgment on the Pleadings**

18 Rule 12(c) allows judgment on the pleadings when "no material fact remains to be resolved and  
 19 . . . the movant is entitled to judgment as a matter of law." *Hal Roach Studios, Inc. v. Richard Feiner &*  
 20 *Co.*, 896 F.2d 1542, 1550 (9th Cir. 1990). The standard is functionally identical to summary judgment,  
 21 but it can be applied where, as here, the pleadings themselves contain the necessary admissions.  
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25 <sup>2</sup> See also, *Id.* Tr. 8:12-13 ("But the issue is the adjudication that I have the authority to rule on is *not* the  
 26 underlying merits of the case, which is, if I were to find in favor of [Plaintiff] or against you, it would  
 27 essentially terminate your action or would resolve your action. . . My role isn't that."); *Id.* Tr. 8:1-11.  
 28 (regarding FOIA's deadlines and the pace of production "That is something that you would be taking up  
 before Judge Gonzalez Rogers."); *Id.* Tr. 10:2-7 ("[T]he relief that you're seeking...about whether or  
 not the Government has properly withheld documents, blown through schedules . . . those have to be  
 addressed by the district court judge that's assigned to the case, not by me.").

1 Defendant acknowledges in its Opposition that BOP's Answer admitted that it had not communicated a  
2 determination letter. ECF No. 45-1 at 6, ECF No. 16 at ¶ 39. BOP's Answer admitted that it had not  
3 completed a search, issued a determination letter identifying scope or exemptions, or made any records  
4 available. ECF No. 16 at ¶ 39, 60. As the court recently observed in *Owen v. ICE*:

6 There is no question here that Defendants violated [FOIA's] statutory provisions.  
7 Defendants assert that they denied in their answer that the records were not made promptly  
8 available. But as Defendants note, they denied the legal conclusion . . . Defendants admitted  
9 the underlying facts . . . those underlying facts establish as a matter of law that Defendants  
failed to provide determinations within 20 days — or any justifiable time period — and  
failed to make records promptly available.

10 CV 22-0550-DSF, \*1, \*11, 2023 WL 9470904, at 6 (C.D. Cal. Jan. 12, 2023) (Plaintiffs sued for  
11 unlawful withholding and moved for partial judgment on the pleadings, declaratory judgment, and a  
12 preliminary injunction in a FOIA action over records of deaths in ICE custody, and the court granted in  
13 part and denied in part the motion—finding FOIA timing violations and granting declaratory relief  
14 against ICE, but denying preliminary injunctive relief.). Here, each of the statutory failures constitutes  
15 unlawful withholding; BOP cannot reframe these violations as permissible delay. *See Id.*; *See also, Gov't*  
16 *Accountability Project v. U.S. Dep't of Health & Human Servs.*, 568 F.Supp.2d 55, 59 (D.D.C. 2008)  
17 (granting in part requester's motion for judgment on the pleadings). Because BOP violated statutory  
18 provisions, Plaintiff is entitled to partial judgment on the pleadings.

20 **First**, there is no issue of material fact that BOP admitted it failed to complete a search in  
21 violation of 5 U.S.C. §§ 552(a)(3)(A), (a)(3)(C)–(D). BOP's Opposition misstates the posture of this  
22 case. BOP has 20 working days to make a determination under 5 U.S.C. § 552(a)(6)(A)(i) and make  
23 responsive records “promptly available” under 5 U.S.C. §§ 552(a)(6)(A)(i), (a)(3)(A), (a)(6)(C)(i). The  
24 question here is not whether BOP's search was comprehensive enough to survive summary judgment  
25 based on affidavits; rather the question is whether BOP completed a search and issued a determination at  
26 the time of its Answer. BOP cannot make an end run around FOIA's provisions by indefinitely  
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1 postponing the completion of a search and then argue that adequacy must be litigated only after  
 2 summary judgment, all while withholding the information from Plaintiff needed to file that motion. The  
 3 Answer admitted no search was completed in violation of 5 U.S.C. 552 §§ (a)(3)(A), (C), (D). *See* ECF  
 4 No. 45-1, at 6. Plaintiff’s Memorandum of Law at 14:3-9; ECF No. 16; ECF No. 2 ¶¶ 39, 60. BOP’s  
 5 attempts to reposition this fact as one only salient to summary judgment.<sup>3</sup> However, at the time of its  
 6 Answer, it was still performing a search and had not communicated the scope of the records and  
 7 withholdings. Until the BOP completes, identifies, and communicates the scope of responsive records, it  
 8 has not satisfied § 552(a)(3)(A), (C), or (D). *See CREW*, 711 F.3d at 188. There are no material facts in  
 9 dispute regarding this claim and Plaintiff is entitled to judgment on the pleadings as a matter of law.  
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12 **Second**, there is no material dispute of fact that BOP’s Answer states it failed to issue a  
 13 determination at the time of its Answer. ECF No. 16 at ¶ 39. Defendant’s interpretation of *CREW* is at  
 14 odds with the standard articulated by then Judge Kavanaugh. *See* ECF No. 47 at 7. BOP first argues that  
 15 ex post facto letters listing page counts and exemptions satisfy FOIA. *Id.* They do not. *CREW* draws a  
 16 distinction between a federal agency’s initial determination and subsequent production: a determination  
 17 must come first, be specific enough to allow appeal, and cannot be satisfied by piecemeal cover letters  
 18 months later. *Citizens for Responsibility & Ethics in Wash (CREW) v. FEC*, 711 F.3d 180, 188 (D.C.  
 19 Cir. 2013) (Kavanaugh, J.). *CREW* distinguished a determination from the production of records after  
 20 that determination:  
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23 a "**determination**".... must be more than just an initial statement that the agency will  
 24 generally comply with a FOIA request and will produce non-exempt documents and  
 25 claim exemptions in the future.” . . . [A] "determination" does not require actual

26 <sup>3</sup>Although adequacy is often litigated after production, the key point here is that at the time of the  
 27 pleadings Defendant had not made a determination and, by extension, had not completed a search or  
 28 review sufficient to communicate one. As *CREW* makes clear, an agency may not “decide to later  
 decide” on a FOIA request. 711 F.3d at 186.

1 production of the records to the requester at the exact same time that the "determination"  
 2 is communicated to the requester. **Under the statutory scheme, a distinction exists  
 between a "determination" and subsequent production."**

3 *Id.* at 188-89. The acknowledgement of a request does not meet this threshold. *See Id.* at 186 n. 4  
 4 (discussing *Spannaus v. DOJ*, 824 F.2d 52, 59 n. 9 (D.C.Cir.1987)). A "'determination' must be subject  
 5 to immediate appeal." *CREW*, 711 F.3d at 187 (emphasis added). BOP attempts to stretch *CREW*'s  
 6 holding to say that its failure to communicate a determination simply allowed Plaintiff to proceed with  
 7 her suit (i.e., "constructive exhaustion). *See* ECF No. 47 at 7. In *Brown v. CBP*, where the agency made  
 8 a nearly identical argument, the Court held: "This argument is tantamount to a willful misreading of  
 9 *CREW*. The case says nothing at all about the vitality of a FOIA claim based on a violation of the  
 10 response deadline." 132 F.Supp.3d 1170, 1173 (N.D. Cal. 2015) (emphasis added) (denying CBP's  
 11 motion to dismiss and holding that allegations of a pattern and practice of failing to timely respond to  
 12 FOIA requests stated a cognizable claim).

13  
 14 BOP admitted that it had not completed a search, communicated a determination letter, or  
 15 "produced any records responsive to it." ECF No. 16 at ¶ 39. The OIP confirmed the same, noting that  
 16 "no adverse determination has yet been made by BOP." ECF No. 1 ¶¶ 40–41; ECF No. 2 ¶¶ 40–41.  
 17 Because BOP was still searching and had not communicated the scope of records to be produced or  
 18 withheld, it failed to issue the timely, appealable determination that *CREW* requires. BOP fails to rebut  
 19 this in its Opposition. ECF No. 47 at 6. Judge Tse said the determination<sup>4</sup> is appropriate for an Article III  
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 25 <sup>4</sup> "The fact that we're talking about production rates is really separate and distinct from how many  
 26 documents are out there. So that is not an issue that I believe I can order, given the information, because  
 27 that would be overstepping the referral. The referral of what is responsive is -- that's up to Judge  
 28 Gonzalez Rogers. Now, what I'm doing in basing the production rates is I'm evaluating the record that is  
 before me on what is an appropriate production rate, given the state of the record. All I'm saying right  
 now is maybe that production rate changes depending upon what further findings are made in the case  
 by the appropriate judge."

1 court's resolution. ECF No. 44 Tr. at 40:36–41:12. Those admitted facts and BOP's failure to rebut this  
2 in its Opposition establish violations of FOIA's timing provisions as a matter of law.

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4 **Third**, there is no issue of material fact that BOP admitted it is withholding records in violation  
5 of 5 U.S.C. § 552(a)(4)(B). Its Answer admitted that the Request's status remained "Document Search."  
6 ECF. No. 16 ¶ 38. BOP denied that it failed to make a determination but conceded that it had not  
7 performed the elements of a determination, including communicating the scope of records to be  
8 produced, withheld, or exempted. *Id.* ¶ 60. BOP's conclusory denial that it was not "wrongfully  
9 withholding records" (*Id.* ¶¶ 69–73) does not create a material issue of fact because the statute defines  
10 withholding by what the agency failed to do, not by how it characterizes its own conduct. BOP misses  
11 the point when it cites to its Answer stating that BOP discussed the Request with counsel. *Id.* Simply  
12 denying the legal conclusion does not erase the admitted facts showing that BOP had withheld records  
13 by not completing a search, issuing a determination, or producing records. A party cannot avoid  
14 judgment by denying a legal conclusion when the underlying facts are undisputed or by insisting the  
15 issue must wait until summary judgment. As the court explained in *Owen*, "Defendants admitted the  
16 underlying facts . . . those underlying facts establish as a matter of law that Defendants failed [to comply  
17 with FOIA]." 2023 WL 9470904, at \*6. As Judge Tse stated, Plaintiff's remedy for BOP's unlawful  
18 withholding was "to file your motion with the district court. . . ." ECF No. 44 Tr. 37:6–19. BOP does not  
19 claim it produced all the records and therefore, it continues to withhold them. Additionally, BOP is  
20 withholding records by changing the format of the records it produces and withholding the native format  
21 records (discussed *infra*). These failures constitute "withholding" as a matter of law within the meaning  
22 of § 552(a)(4)(B).  
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1           **Fourth**, there is no issue of material fact that BOP admitted it failed to process the expedited  
2 Request “as soon as practicable,” as BOP does not deny placing it in the ordinary backlog, in violation  
3 of 5 U.S.C. § 552(a)(6)(E)(iii) and 28 C.F.R. §§ 16.5(b), (e). BOP treats Plaintiff’s claim that it failed to  
4 process the expedited request “as soon as practicable” under 5 U.S.C. § 552(a)(6)(E)(iii) as simply  
5 another disagreement about production pace that should fall within the scope of the discovery referral.  
6 ECF No. 47 at 3-4. In doing so, BOP ignores that Congress created expedited processing as a separate  
7 statutory obligation. Judge Tse stated that he lacked the authority to decide whether FOIA’s timing  
8 requirements had been violated. He explained that timing “is something that you would be taking up  
9 before Judge Gonzalez Rogers, that she’s the one who makes the decision whether or not the  
10 Government has failed to comply with FOIA.” ECF No. 43 Tr. 8:13–15. Whether BOP satisfied the “as  
11 soon as practicable” mandate is not a discovery issue, but a merits question Judge Tse explained were  
12 reserved for Article III review.  
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15           **Fifth**, as briefed above, BOP admitted (ECF No. 6 at ¶ 39, 60) it failed to make responsive  
16 records “promptly available” as required by 5 U.S.C. §§ 552(a)(3)(A), (a)(6)(C)(i), leaving no issue of  
17 material fact as to whether BOP is violating FOIA.  
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20           **C. Defendant’s Post-Answer Pattern and Practice of FOIA Violations Requires Article**  
21           **III Review and Declaratory Judgment.**

22           Defendant attempts to side-step a ruling against it by claiming that FOIA is a “comprehensive  
23 scheme” that forecloses Plaintiff’s relief under the Declaratory Judgment Act. ECF No. 47 at 8-9. Its  
24 sole authority, *Isiwele v. DHS*, 85 F. Supp. 3d 337, 352 (D.D.C. 2015), involved a pro se incarcerated  
25 plaintiff who sought declaratory relief for a single instance of “unlawful withholding,” the court said  
26 was available under FOIA; the case did not involve a pattern-and-practice claim. By contrast, Plaintiff  
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1 seeks declaratory relief to address Defendant’s continuing pattern of violating multiple FOIA  
2 provisions—relief that is both authorized and necessary to remediate ongoing statutory noncompliance.

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4 This jurisdiction recognizes that declaratory judgment is an appropriate remedy for a pattern *and*  
5 *practice* of FOIA noncompliance. *See, e.g., Our Children’s Earth Found. v. Nat’l Marine Fisheries*  
6 *Serv.*, 2015 WL 4452136, at \*8 (N.D. Cal. Jul. 20, 2025) (granting in part and denying in part cross-  
7 motions for summary judgment; holding exemption, adequacy, cutoff, and pattern-and-practice issues in  
8 abeyance pending supplementation of the record); *Nightingale v. USCIS*, 507 F. Supp. 3d 1193, 1207  
9 (N.D. Cal. 2020) (granting summary judgment for plaintiffs on FOIA timing violations and declaratory  
10 and injunctive relief; denying broader notice relief). Since at least 1988 courts find declaratory judgment  
11 not only been appropriate but necessary to protect a FOIA plaintiff against future harm by a policy or  
12 practice. *See Owen*, 2023 WL 9470904, at \*7 (“A plaintiff suffers an ‘injury in fact’ when the plaintiff  
13 fails to obtain information which must be publicly disclosed pursuant to a statute.”) (citing *Fed. Election*  
14 *Comm’n v. Akins*, 524 U.S. 11, 21 (1998); *Nightingale*, 507 F. Supp. 3d at 1207; *Our Children’s Earth*  
15 *Found.*, 2015 WL 4452136, at \*8 (granting declaratory relief for an agency’s repeated failure to meet  
16 FOIA’s determination deadline); *Payne Enter. v. U.S.*, 837 F.2d 486 (D.C. Cir. 1988) (remanding with  
17 instructions to enter declaratory judgment); *Shapiro*, 507 F. Supp. 3d at 336 (“Courts in this circuit grant  
18 declaratory relief when they find that an agency has a policy or practice that violates FOIA . . . .”)  
19 (granting and denying in part cross-motions for summary judgment and entering declaratory judgment  
20 that withholding unlawful). Where “a plaintiff alleges a pattern or practice of FOIA violations and seeks  
21 declaratory or injunctive relief, those claims are not mooted by the production of requested documents if  
22 the plaintiff can show:” harm, that it was “not merely an isolated incident,” and that “the plaintiff  
23 [herself] has a sufficient likelihood of future harm by the policy or practice.” *Animal Legal Def. Fund v.*  
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1 *United States Dep't of Agric.*, 933 F.3d 1088, 1092 (9th Cir. 2019) (internal quotation marks omitted)  
2 (ALDF appealed the district court's grant of summary judgment to USDA). Like in *Nightingale*, BOP's  
3 practices here—burying expedited requests, delaying productions for years, and releasing records in  
4 degraded formats—amount to a systemic failure to comply with FOIA's statutory obligations.  
5 Declaratory relief is therefore required to ensure that Plaintiff's rights, and FOIA's mandate, are  
6 enforced going forward. Where there is a harmful practice or policy of delayed disclosure that seems  
7 likely to repeat itself, granting declaratory judgment is squarely within this Court's authority.  
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10 If adopted, BOP's position would leave Plaintiff with a statutory right but no remedy: it argues  
11 Plaintiff should continue to meet and confer (*see* ECF No. 47 at 3) on issues BOP has already refused to  
12 address or rejected—issues that Magistrate Judge Tse expressly determined were outside the scope of  
13 his referral and reserved for this Court. ECF No. 44, Tr. 20:19–21:13. Plaintiff regarded attempts to  
14 confer on those issues as exhausted when BOP both rejected proposals and declined to reply to  
15 correspondence. See ECF No. 45-2 at ¶¶ 45-51. Scheduling further meetings is futile when BOP has  
16 already declined to answer proposals or respond to agenda items, and when Judge Tse himself suggested  
17 these issues were for Article III judicial resolution. Judge Tse stated that statutory violations stemming  
18 from BOP's post-Answer actions briefed by Plaintiff should be brought before this court, such as  
19 repeated refusal to disclose the scope of responsive records and withholdings by taking records readily  
20 reproducible by the FOIAXpress software, and changing them by merging distinct documents into large,  
21 non-searchable PDFs, stripping metadata. ECF No. 21, Case Management Statement; ECF No. 28, Joint  
22 Case Management Statement; ECF No. 31, First Joint Discovery Letter Brief; ECF No. 33, Discovery  
23 Letter Brief 2, Production Schedule; ECF No. 34, Discovery Letter Brief 3; and ECF No. 39, Joint  
24 Status Report.  
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1 In its Opposition, BOP contends that Plaintiff is not entitled to declaratory relief as to the pattern  
2 and practice of its FOIA violations because it is producing records each month in compliance with  
3 FOIA. In response, Plaintiff submits Exhibit 2, the Declaration of Jerry Bui, an expert in the field of  
4 digital forensics and e-discovery (the “Bui Decl.”).<sup>5,6</sup> the Bui Decl. demonstrates that BOP’s current  
5 choices in workflows cause the statutory violations (delayed searches, degraded formats, and slow  
6 production) which constitute a systemic pattern of noncompliance with FOIA’s timing, format, and  
7 diligence requirements. Bui explains that BOP’s chosen search terms and process have not resulted in it  
8 conducting a search “reasonably calculated to uncover all relevant documents.” “If BOP reviewers had  
9 to go through 1,000 pages but found 500+ pages to be ‘non-responsive,’ that strongly suggests that the  
10 initial search terms or criteria pulled in a lot of irrelevant material . . . In modern e-discovery practice...  
11 responsiveness rates above 80% are common. A response rate as low as 50% indicates an inefficient  
12 review process.” *Id. at* ¶ 35. BOP’s workflow choices also prevent expedited processing and prolong  
13 delay, contrary to FOIA’s mandate: “The current workflow employed by BOP... is archaic and  
14 backwards, more akin to practices from 15–20 years ago than to modern e-discovery standards, despite  
15 having powerful tools at its disposal. This is not a limitation of the tools themselves, but a workflow  
16 choice.” *Id. at* ¶ 29(b). As Bui explains, “With FOIAXpress (and its integrated Casepoint features) fully  
17 enabled, a competent team should achieve a production rate of no less than 1,500–2,500 pages per  
18 month under ordinary FOIA review . . . The claimed rate of 1,000 pages per month is extremely slow –  
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23 <sup>5</sup> Mr. Bui has 25 years of experience “in data collection, deduplication, and e-discovery productions and  
24 has testified as an expert witness more than 30 times in civil matters (for both plaintiffs and defense) and  
25 have been deposed previously.” *See* Ex. 3 ¶ 2. His declaration covers *inter alia*, BOP’s workflows, pace  
of production, record formatting, and feasibility.

26 <sup>6</sup> Additionally, Judge Tse invited an expert declaration on how BOP’s FOIAXpress software capabilities  
27 may be impacting the pattern and practice of issues Plaintiff briefed, especially those he thought may be  
28 reserved for the Article III court<sup>6</sup>: “do you think that you could provide testimony that says that if they  
use this particular software, that it would not decrease the production rate?” ECF No. 44 Tr. 17:23–25.  
To that end,

1 on the order of ten times slower than what modern e-discovery tools can achieve.” *Id. at* ¶ 4. Bui further  
2 notes BOP continues to withhold records in its production method choices, which undermine the  
3 capabilities of the FOIAXpress software. BOP’s chosen workflow constitutes “calculated ambiguity,”  
4 changing hundreds of records from the native format maintained in FOIAXpress,<sup>7</sup> and withholding them  
5 from Plaintiff by merging them into PDFs, which are new records. *Id. at* ¶ 8. He confirms that “all of  
6 the record elements cited by Plaintiff as ‘lost’ in BOP’s current process (e.g., metadata, email threading,  
7 searchability) can be preserved and exported directly from FOIAXpress.” *Id. at* ¶ 6. This underscoring  
8 that the limitation here is a pattern and practice of choices, not a technical barrier. *Id. at* ¶ 7. BOP’s  
9 Opposition fails to meaningfully rebut Plaintiff’s arguments that BOP’s pattern and practice of  
10 withholding records, failing to act with due diligence, and ignoring FOIA’s mandates on timing,  
11 expediting, and format present systemic violations which are appropriate for declaratory relief.  
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14 **First**, BOP unlawfully withheld records and failed to comply with FOIA’s timing provisions.  
15 *See Fiduccia v. DOJ*, 185 F.3d 1035, 1041 (9th Cir. 1999) (vacated and remanded improper grant of  
16 “Open America” stay without “exceptional circumstances,” and inadequate factual basis for several  
17 FOIA rulings). BOP states that it produced records monthly after ordered, so there is no improper  
18 withholding. ECF No. 47 at 3. But producing records slowly, changing their format to make them less  
19 usable, and stripping metadata is still “withholding” under FOIA when records are not made “promptly  
20 available” or in the requested form where they are readily reproducible. As Plaintiff’s expert explains,  
21 “Producing multiple documents merged into a single, non-searchable PDF violates widely accepted e-  
22 discovery norms . . . because it destroys metadata, impedes the effective use of technology-assisted  
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27 <sup>7</sup> Some of these records have likely been preserved in their native format in other litigation, including  
28 *California Coal. for Women Prisoners v. United States*, No. 4:23-CV-4155-YGR (N.D. Cal. 2023), and  
*M.R. v. Fed. Corr. Inst. Dublin*, No. 4:22-cv-05137 (N.D. Cal. filed 2022).

1 review, and unfairly shifts the burden and cost of processing to the requester.” Bui Decl. ¶ 5. These  
2 choices amount to a pattern and practice of improper withholding within the meaning of FOIA. *See* ECF  
3 No. 47 at 8.

4  
5 **Second**, as previously briefed, Defendant failed to make all nonexempt responsive records  
6 promptly available as required by 5 U.S.C. § 552(a)(4)(B), and its Opposition offers no evidence that it  
7 has done so at any time since filing its Answer. *See* ECF No.47 at 8.

8  
9 **Third**, as previously briefed, BOP failed to process Plaintiff’s expedited request “as soon as  
10 practicable,” 5 U.S.C. § 552(a)(6)(E)(iii); 28 C.F.R. §§ 16.5(b), (e), and other than noting that it has  
11 been reviewing (not producing) 1,000 pages monthly since ordered (ECF No. 47 at 3), its Opposition  
12 offers no evidence that it has complied at any time since filing its Answer.

13  
14 **Fourth**, as briefed (ECF No. 21, 28, 31, 33, 34, 39), and discussed in hearings (ECF No. 43, 44),  
15 Defendant refuses to provide records in their readily reproducible format, 5 U.S.C. § 552(a)(3)(B), and  
16 its Opposition offers no evidence that it has done so at any time since filing its Answer. Magistrate  
17 Judge Tse said that questions about format and metadata were outside the scope of his referral and must  
18 be presented to this Court.<sup>8</sup>

19  
20  
21 **Fifth**, BOP’s defenses fall flat: it has failed to show exceptional circumstances or due diligence  
22 to justify delay, and waived the Open America Defense, depriving the Court of its authority to extend  
23 time under 5 U.S.C. § 552(a)(6)(C)(i).<sup>9</sup> Defendant declined to argue this issue in its Opposition, which  
24

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25 <sup>8</sup> He explained that disputes about “how the documents are going to be, how the records are  
26 going to be delivered and produced and in what fashion, under FOIA, ... may have to be litigated.” ECF  
No. 43 Tr. 28:14–23.

27 <sup>9</sup> As discussed in Plaintiff’s motion (ECF No. 45-1 at 20), Defendant waived this defense in a  
28 hearing. *See* ECF No. 43, Tr. at 20:19-20.

1 constitutes further waiver. The remaining task before this Court is to fashion an appropriate remedial  
2 scheme to bring Defendant into compliance with FOIA using the broad range of tools available to it. *See*  
3 ECF No. 45-1 at 18.  
4

5 **D. Plaintiff Is Entitled to Attorney’s Fees and Litigation Costs**

6 A plaintiff who has “substantially prevailed” is eligible for fees. 5 U.S.C. § 552(a)(4)(E). Here,  
7 Plaintiff has already prevailed: this lawsuit prompted productions that did not begin until after the suit  
8 was filed. Full briefing on entitlement can occur post-merits.

9 **III. CONCLUSION**

10 More than a year into this case, neither Plaintiff nor the Court knows when production will be  
11 complete. It is undisputed that BOP refused to provide information about the number of responsive  
12 records, their format, applicable exemptions, or an estimated completion date. Instead, it issues letters  
13 summarizing some, but not all required, aspects of the release. Under BOP’s proposed approach,  
14 Plaintiff would have to wait six years until the end of production to adjudicate these issues—while each  
15 interim release may remain unlawful. That outcome would ensure years of defective productions and  
16 duplicative work. Judge Tse confirmed he could not decide these merits questions, and Defendant’s  
17 continuing post-Answer conduct shows a pattern and practice of FOIA violations that will persist absent  
18 Article III review. Declaratory relief is therefore warranted.  
19  
20  
21

22 Respectfully submitted,

23 DATED: September 9, 2025

24 Signature:           /s/          

25 By:   Caitlin Kelly Henry, Esq.