

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE PROTECT DEMOCRACY
PROJECT, INC.,

Plaintiff,

v.

DEPARTMENT OF JUSTICE, *et al.*,

Defendants.

Case No. 20-cv-00172-RC

**UPDATED DECLARATION OF
VANESSA R. BRINKMANN**

I, Vanessa R. Brinkmann, declare the following to be true and correct:

1. I am Senior Counsel in the Office of Information Policy (OIP), United States Department of Justice (Department or DOJ). In this capacity, I am responsible for supervising the handling of the Freedom of Information Act (FOIA) requests subject to litigation processed by the Initial Request Staff (IR Staff) of OIP. The IR Staff of OIP is responsible for processing FOIA requests seeking records from within OIP and from within six senior leadership offices of the Department, specifically the Offices of the Attorney General (OAG), Deputy Attorney General (ODAG), Associate Attorney General (OASG), Legal Policy (OLP), Legislative Affairs (OLA), and Public Affairs (PAO).

2. The IR Staff of OIP is responsible for conducting searches in response to FOIA requests seeking records of the above-referenced offices, for determining whether records located pursuant to its searches are responsive to those FOIA requests, and, if so, whether such records are appropriate for release in accordance with the FOIA. In processing such requests, the IR Staff consults with Department personnel in the senior leadership offices, with Department records management staff and/or with other components within the Department, as well as with others in the Executive Branch.

3. I make the statements herein on the basis of personal knowledge and on information acquired by me in the course of performing my official duties, including my familiarity with OIP's resources and procedures for responding to FOIA requests, and my review of the request at issue in this case.

4. The purpose of this declaration is to respond to Plaintiff's motion for a preliminary injunction, requesting that the Court order Defendants to produce all documents responsive to Plaintiff's FOIA request by March 18, 2020, and, within twenty-four hours of the court's order, produce (1) any OLC memoranda addressing the legality of the Soleimani strike and/or any obligation to consult with Congress regarding the strike; (2) any correspondence or memoranda addressing the legality of the strike drafted by officials serving any one of the Defendants and shared with the National Security Council; and (3) any "record of discussions" or "summary of conclusions" related to a meeting or meeting(s) involving lawyers for any of the Defendants and pertaining to the Soleimani strike; or confirmation that no such records exist. See Plaintiff's Motion for Preliminary Injunction, ECF No. 14.

5. This declaration provides the basis for OIP's conclusion that Plaintiff's proposed processing schedule would be exceedingly burdensome and that it is simply not feasible to respond to Plaintiff's request within the timeline set forth in its motion. For the reasons set forth below, OIP does not have the resources to fully process Plaintiff's request (which was just submitted to OIP in January) – i.e., to complete all records searches, to process those search results for responsiveness to Plaintiff's request and apply FOIA exemptions, to consult with other Department components and/or other Executive Branch entities as required by Department regulations (28. C.F.R. § 16.4(d)), to make final disclosure determinations, and produce non-exempt material to Plaintiff – within the next three weeks. Likewise, for the same reasons, OIP does not have the resources to complete searches and consultations, and process a sub-set of

these records within a mere twenty-four hours of an order from the court. Even to the extent that OIP could re-prioritize pending requests and re-allocate resources in order to process Plaintiff's request more quickly (but not at the extraordinarily fast past that Plaintiff now seeks), OIP cannot do so without adversely impacting other requests, including those granted expedited processing and other cases in litigation. Nonetheless, for the same reasons that expedited processing was granted for Plaintiff's request, OIP recognizes the need to respond expeditiously, and continues to be willing to work with Plaintiff to find ways to process its request more quickly.

Plaintiff's FOIA Request to OIP

6. By letter dated January 3, 2020, Plaintiff submitted a FOIA request to OIP seeking two categories of records: (1) "Any and all records, including but not limited to emails and memoranda, reflecting, discussing, or otherwise relating to the January 2, 2020 military strike in Iraq and/or the President's legal authority to launch such a strike." and (2) "Any and all records, including but not limited to emails and memoranda, reflecting or related to communications with Congress, congressional committees, or individual members of Congress regarding the January 2, 2020 military strike in Iraq, including but not limited to records that reflect consideration of whether or not to inform Congress, congressional committees, or individual members of Congress of the strike, and/or the existence or absence of any obligation to inform Congress, congressional committees, or individual members of Congress of the strike." See ECF No.14-3.

7. By letter date January 14, 2020, OIP acknowledged receipt of Plaintiff's FOIA request, and informed Plaintiff that its request for expedited processing was granted, and had been assigned request tracking number DOJ-2020-001616. See ECF No. 1-8. Additionally, and as Plaintiff noted in its Amended Complaint (see ECF No. 13 at ¶ 49), OIP's acknowledgement letter notified Plaintiff that the records it seeks falls within "unusual circumstances" and invited

Plaintiff to contact OIP to discuss "reformulation or an alternative time frame for the processing of [its] request." See ECF No. 1-8. To date, Plaintiff has not contacted OIP.

8. On January 22, 2020, Plaintiff filed suit in connection with the FOIA requests made to other components of the Department as well as other federal agencies. See Complaint, ECF No. 1. Then, on February 19, 2020, Plaintiff filed an Amended Complaint including allegations against OIP, and a Motion for Preliminary Injunction. See ECF Nos. 13 and 14, respectively.

Status of Plaintiff's FOIA Request in OIP

9. Shortly after receiving Plaintiff's request, OIP initiated its search efforts to respond to this request. On January 14, 2020, OIP notified OAG, ODAG, and OLA of the request, that their unclassified emails and hard drives would be searched, and requested that, to the extent any officials within those offices maintain types of records that would not be located as a result of a search of their unclassified electronic records, to inform OIP as soon as possible. On or around the same time OIP issued these search notifications, OIP also submitted a search request to the Justice Management Division's Office of the Chief Information Officer (JMD/OCIO), the office within the Department that physically maintains the electronic records for the six senior leadership offices of the Department, and placed Plaintiff's request in the search queue for expedited requests.

10. To date, there are twenty requests for which expedition was granted ahead of Plaintiff's in its current search queue. This number refers to requests, both those in litigation and those that are not, that have been granted expedited processing but for which the searches are still pending. In other words, there are twenty similarly-situated requests ahead of Plaintiff's request for which OIP is still waiting to get search results back.

11. As outlined in greater detail below, OIP employs a number of different search queues to efficiently process all electronic searches. Based on its position in its current search

queue, and the current number of custodians required to be searched, OIP's best estimate is that Plaintiff's search results will be returned by August 1, 2020. However, as noted supra and in its acknowledgement letter of January 14, 2020, OIP is willing to discuss with Plaintiff ways to reformulate its request in order to reach an alternative time frame.

12. Additionally, in an effort to provide Plaintiff with a response in advance of the return of search results in August 2020, OIP also initiated search efforts in the Departmental Executive Secretariat (DES). The DES is the official records repository of OAG, ODAG, and OASG, and maintains some OLA records, including records of all formal, controlled, unclassified correspondence sent to or from those offices from January 1, 2001, to present day. OIP has already completed a search in DES, and located no records responsive to Plaintiff's request.

OIP's Current Caseload and Staffing Levels

13. As stated above, the IR Staff of OIP is responsible for processing FOIA requests seeking records from within OIP and from within six senior leadership offices (OAG, ODAG, OASG, PAO, OLA, OLP).¹ The IR Staff's Litigation Team is specifically responsible for handling those requests that are in litigation. The remainder of the IR Staff is responsible for handling all other FOIA requests – i.e., requests that are not in litigation.

14. In my original declaration, I noted that, as of February 25, 2020, OIP had 1,834 open FOIA requests and 121 ongoing litigation matters. Now, I can confirm that, as of March 10, 2020, OIP has 1,890 open FOIA requests and 130 ongoing litigation matters.

¹ As part of its FOIA responsibilities on behalf of Department senior leadership offices, OIP is also responsible for processing certain records of the Special Counsel's Office (SCO). FOIA requests and associated litigation for SCO records, which is an extraordinarily large records collection, account for a significant amount of the IR Staff's workload.

15. The non-litigation IR Staff consists of five full-time employees (FTEs) (Chief of the Initial Request Staff, two reviewers, and four Government Information Specialists (GIS)), one temporary detailee (six-month detail with one day left in OIP), and three contractors. The four GIS, three contractors, and one detailee are responsible for processing all FOIA requests received by OIP that are not in litigation, subject to review by the IR Staff reviewer and/or Chief. In sum, the 1,890 non-litigation FOIA requests involving senior leadership office and SCO records under OIP's purview are currently processed by a staff of eight (very soon to be seven) individuals and two reviewers.

16. The IR Staff's Litigation Team consists of seven FTEs (Senior Counsel, two Senior Supervisory Attorneys, four Attorney-Advisors), and three temporary detailees (each for a six-month detail with approximately three months left with OIP). Each FOIA litigation is assigned to a team of two: one of the four Attorney-Advisors, paired with one of the two Senior Supervisory Attorneys. Each Attorney-Advisor is responsible for handling all aspects of each litigation request assigned to them, including searching for and processing responsive records, coordinating consultations within the Executive Branch, drafting declarations and other court filings, and working with the litigators assigned to each case, subject to review by the Senior Supervisory Attorney and/or the Senior Counsel. Each of the new detailees is assigned either to specific tasks related to ongoing litigations, or to handle new litigations paired with one of the two Senior Supervisory Attorneys. Given their very short amount of time at OIP, the detailees carry a significantly smaller caseload than the four staff attorneys. In sum, all 130 FOIA litigations involving senior leadership office records under OIP's purview are processed by a staff of four attorneys, three reviewing attorneys, and three temporary detailees.

17. Of the 130 matters being handled by the IR Staff Litigation Team, OIP is a named litigant in 107 at varying stages in multiple jurisdictions. Of these 107 matters, eighty-four are

filed in the United States District Court for the District of Columbia or the United States Court of Appeals for the District of Columbia and twenty-three are filed in other jurisdictions. Of the remaining twenty-three matters, thirteen are litigation consultations and twelve are litigation referrals, which OIP receives from other DOJ components or Executive Branch agencies who are named defendants in FOIA litigation. For perspective, about one year ago, as of February 19, 2019, OIP was involved in a total of ninety-three ongoing litigation matters. As stated in my original declaration, as of February 25, 2020, the 121 litigation matters amounted to a 30% increase in litigation over the preceding year alone. As compared to the preceding year, OIP's current litigation case load (130 litigation matters) now amounts to a 40% increase in litigation.

18. Moreover, of the 107 matters in which OIP is a named litigant, eighteen of these cases involve requests that have been granted expedited processing and which pre-date Plaintiff's request. The subject matter of these requests include similarly high-profile topics as Plaintiff's request that are equally meritorious and of great interest to the public. The subject matters of these requests range from records related to the SCO, Ukraine, Executive Order 13769 (the "Travel Ban"), Deferred Action for Childhood Arrivals, Supreme Court Associate Justice Brett Kavanaugh, and the 2020 Census. By granting Plaintiff's Motion for Preliminary Injunction to process Plaintiff's request more quickly, the Court would unfairly displace these other equally-meritorious FOIA requests, which pre-date Plaintiff's request and for which expedition was granted.

19. OIP has been inundated by an ongoing and unprecedented surge of FOIA requests, which began in the middle of Fiscal Year² (FY) 2016 and which has not abated. In addition to

² A fiscal year is defined by the U.S. Government's budget cycle, and runs from October 1 of the budget's prior calendar year through September 30 of the calendar year being described. For example, Fiscal Year 2020 begins on October 1, 2019, and ends on September 30, 2020.

the sheer volume of incoming FOIA requests, OIP has also experienced an influx of increasingly complicated requests requiring complex, voluminous searches of a variety of electronic records, most notably emails, often implicating dozens of records custodians and vast amounts of electronic data. At the same time, the number of lawsuits filed in connection with requests being processed by OIP has exponentially increased – in fact, tripling in the past three years.³ This combination of increased volume of requests and custodians, request scope and complexity, and exponential increase in litigation has substantially increased the amount of time and resources required for OIP to complete its searches and processing, and has exhausted OIP’s resources.

20. To OIP’s knowledge, DOJ has not requested additional funding from Congress to hire FTEs to assist in processing FOIA requests. The Department recognizes that solely adding staff, without increasing capacity, will not fully address the problem. Consequently, the Department has invested significant resources in modernization to bolster the Department’s technical capacity and capability in an effort to handle the increased volume of FOIA requests, as well as shifting internal resources to address issues with staffing.

21. In FY 2019, OIP utilized three contractors and one temporary detailee to work on non-litigation FOIA requests, as described supra in paragraph fifteen, allowing the IR Staff to process more requests than it received over the last six months of FY 2019. Additionally, in FY 2018 and 2019, OIP reallocated internal resources, and moved two Senior Attorneys from another team to the IR Staff Litigation Team to address the exponential increase in litigation. To further address staffing constraints, at the beginning of 2020, the IR Staff Litigation Team onboarded three Attorney-Advisor detailees, and is exploring acquiring contractors to assist with the litigation demand.

³ At the beginning of FY 2017, OIP was involved in forty FOIA litigation matters. As noted supra, OIP is currently involved in 130 FOIA litigation matters.

22. Furthermore, in FY 2019, OIP reorganized its internal search processing queues by expanding the number of search queues used by JMD/OCIO, the entity that conducts all e-mail and electronic document searches of senior leadership office records custodians on behalf of OIP. These search queues are distinguished from each other by the total number of senior leadership office search custodians to be searched. This process allows JMD/OCIO to more efficiently and effectively run searches for simpler/narrower requests, which may be completed more quickly when they are not in the search queue behind larger, more complex requests involving more search custodians.

23. Finally, JMD/OCIO has advised that it is making improvements to efficiency and search capacity for FOIA records searches, and that it is working to devote additional resources to address the backlog of records searches pending in its queues with the addition of four contractors in FY 2020. Additionally, JMD advises that it has an expected increase of four servers between FY 2019 and FY 2020 and has increased its software licensing capacity by 250%.

24. Despite all of the challenges described above, OIP continues to employ various internal system improvements and adaptive methods that have resulted in record numbers of FOIA requests being processed to completion each year. However, OIP recognizes that even with these advances, its backlog of requests continues to grow, and it must continue to identify new efficiencies to ensure that the FOIA caseload management is as dynamic as the breadth, complexity, and volume of the FOIA requests being received by OIP. For this reason, OIP continues to look at ways to increase staffing levels while also improving the technological processes which are at the heart of processing the FOIA requests received by OIP.

25. Notwithstanding limited resources and surging FOIA obligations, OIP has consistently succeeded in fulfilling more FOIA requests annually. In FY 2014 and 2015, OIP

fulfilled 1,265 and 1,528 FOIA requests, respectively. In FY 2016, OIP fulfilled over 2,000 requests for the first time, fulfilling a total of 2,054 FOIA requests. In FY 2017, OIP fulfilled 2,113 FOIA requests. In FY 2018, OIP achieved an all-time record, fulfilling 2,790 FOIA requests. FY 2019 was the first time since 2014 where OIP did not fulfill more requests than the previous year, likely due to both the month-long government shutdown at the beginning of FY 2019 and a change in OIP's tracking system that took place halfway through FY 2019. Still, OIP was able to fulfill 2,460 FOIA requests in FY 2019, which is more requests than OIP received in the same Fiscal Year.

26. In sum, OIP cannot meet the proposed processing schedule that Plaintiff requests in its motion for a preliminary injunction. OIP is diligently working to respond to Plaintiff's request as soon as practicable. As a result of a multi-year sustained surge in the number of complex FOIA request received and despite processing innovations and staffing increases, the electronic records search for Plaintiff's request will not be returned for review and processing prior to August 1, 2020. To require OIP to respond to Plaintiff's request more quickly would displace other equally meritorious requests that pre-date Plaintiff's and which are expedited, in litigation, or both. However, OIP remains open to working with Plaintiff to find other ways to narrow the search and provide an alternative processing schedule, and has taken proactive steps to identify ways to narrow the search, and improve the search estimate. Specifically, since the filing of my original declaration, OIP has engaged in discussions with OAG, ODAG, and OLA in an effort to identify a narrower set of custodians, which could impact OIP's search estimate.

Pursuant to 8 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.



Vanessa R. Brinkmann
Senior Counsel

Executed this 11th day of March 2020.