

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

BUZZFEED INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF JUSTICE,

Defendant.

Civ. A. No. 18-2370 (CRC)

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 (DOJ or “the Department”). 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 of OIP (IR Staff).¹ The IR Staff is responsible for processing FOIA requests seeking records from within OIP and from six senior leadership offices of the DOJ, 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). The IR Staff determines whether records responsive to FOIA requests exist and, if so, whether they can be released in accordance with the FOIA. In processing such requests, the IR Staff consults with personnel in the senior leadership offices

¹ OIP consists of three teams, including the IR Staff, Appeals Staff, and Compliance Staff. The IR Staff is responsible for processing FOIA requests, including requests subject to litigation. In the context of this declaration, references to “OIP” are intended to refer to the IR Staff, unless otherwise indicated.

and, when appropriate, other components within the DOJ, as well as with other Executive Branch agencies.

2. I make the statements herein on the basis of personal knowledge, as well as information provided to me by others within the Executive Branch of the Federal Government with knowledge of the types of records at issue in this case, and information acquired by me in the course of performing my official duties.

3. The purpose of this declaration is to support Defendant's motion for a stay pursuant to 5 U.S.C. § 552(a)(6)(C)(i)-(iii) (2012 & Supp. V 2017) and *Open Am. v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976), to allow OIP time to reach Plaintiff's request in our FOIA processing queue, complete a search for any records responsive to Plaintiff's FOIA request, preliminarily review any potentially responsive agency records that are subject to the FOIA, and confer with Plaintiff regarding a processing schedule. Specifically, OIP requests that the Court enter a stay through November 26, 2019.

4. The FOIA includes a provision that is applicable when, as in this case, a requester files suit in federal district court on the basis of "constructive exhaustion" of administrative remedies (i.e., when an agency is unable to respond to a FOIA request within statutory time limits). "If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records." 5 U.S.C. § 552(a)(6)(C)(i). A stay is warranted when an agency "is deluged with a volume of requests for information vastly in excess of that anticipated by Congress, when the existing resources are inadequate to deal with the volume of such requests within the time limits of subsection (6)(A), and when the agency can show that it 'is exercising due diligence' in processing the requests." See *Open Am.*, 547 F.2d

at 616. Although exceptional circumstances would not exist where a delay results from a predictable workload of requests, exceptional circumstances may exist where the agency demonstrates reasonable progress in reducing its backlog of requests. *See id.* § 552(a)(6)(C)(ii).

5. This declaration provides the basis for OIP's conclusion that "exceptional circumstances exist" in light of the following: a substantial surge in incoming FOIA requests that began in FY 2016, has continued through the first half of FY 2019, and which was unpredictable both in terms of its volume and the fact that it did not abate as expected; the increasingly complex and far-reaching nature of the records searches that OIP must execute, coupled with the need for OIP staff to review vast amounts of electronic data retrieved from the searches in order to respond to these requests; the overwhelming strain on OIP's resources as a result of this spike in requests; the compounding strain on resources as a result of back-to-back technical issues impacting the team that conducts searches for OIP, followed by a historically long partial government shutdown; and that OIP is "exercising due diligence" in responding to a continually-increasing deluge of complex requests, including Plaintiff's. For the reasons set forth below, OIP requires approximately seven months from the time of this filing to complete records searches in response to Plaintiff's request, and an additional thirty days to complete a preliminary review of any material retrieved and, upon completion of that preliminary review, to confer with Plaintiff regarding a processing schedule.

Plaintiff's FOIA Request

6. Plaintiff submitted a FOIA request to OIP, dated August 10, 2018, seeking various records pertaining to the DOJ Religious Liberty Task Force (RLTF). Plaintiff indicated that the temporal scope of the request was from September 1, 2017, until the date the search was conducted. Plaintiff requested expedited processing and a waiver of all fees associated with its

request. A copy of Plaintiff's FOIA request, dated August 10, 2018, is attached hereto as Exhibit A.

7. On August 23, 2018, OIP acknowledged receipt of Plaintiff's FOIA request on behalf of OAG, OASG, PAO, and OLP, and confirmed its four administrative tracking numbers DOJ-2018-007611 (AG), DOJ-2018-007687 (ASG), DOJ-2018-007688 (PAO), DOJ-2018-007689 (OLP). In this acknowledgement letter, OIP informed Plaintiff that Plaintiff's request for expedited processing had been denied. OIP also informed Plaintiff that Plaintiff's FOIA request would require a search in and/or consultation with another Office and noted that, therefore, unusual circumstances apply. Accordingly, OIP informed Plaintiff that Plaintiff's FOIA request had been placed in the "complex" processing track and that OIP would not be able to respond within the twenty-working-day time limit, or within the ten additional days provided by the statute. Finally, OIP deferred making a determination on Plaintiff's request for a fee waiver. A copy of OIP's acknowledgement letter, dated August 23, 2018, is attached hereto as Exhibit B.

8. On October 15, 2018, Plaintiff filed suit. *See* Compl., ECF No. 1.

OIP's Surging FOIA Obligations

9. OIP has been inundated by an ongoing and unprecedented surge of FOIA requests, which began in the middle of Fiscal Year (FY) 2016,² and which has not abated. Although the volume of FOIA requests received by OIP steadily and significantly increased from FY 2008 to FY 2016, OIP encountered an especially steep and unanticipated spike midway through FY

² The fiscal year is the accounting period for the federal government which begins on October 1 and ends on September 30. The fiscal year is defined by the calendar year in which it ends (e.g. Fiscal Year 2017 began on October 1, 2016 and ended on September 30, 2017).

2016.³ This spike was not a onetime event, but instead was the beginning of a massive surge of requests that continues to this day.⁴ Each year since, OIP's incoming volume of requests has vastly outpaced OIP's historical averages.⁵

10. In addition to the sheer volume of incoming 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—tripling in the past three years. This combination of increased volume of requests and custodians, request scope and complexity, and 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. Despite all of this, OIP has responded by employing a variety of improvements and adaptive methods that have resulted in record numbers of requests being processed to completion each year. However, OIP recognizes that even with these advances, its backlog of requests continues to grow, and it is

³ In the first half of FY 2016, OIP received 751 requests (an annual pace of 1,502). In the second half of FY 2016, OIP received 1,061 requests (an annual pace of 2,122), a 41.3% increase over the first half of the year.

⁴ In FY 2017, OIP received 2,818 requests. In FY 2018, OIP received an even larger 3,523 requests. And, as of March 29, 2019, OIP has received 1,541* requests (an annual pace of 3,082). *Note that in the first half of FY 2019, OIP modified the way it administratively tracks new FOIA requests, assigning only one tracking number to each FOIA request instead of one number per Office that requires a search. Therefore, for purposes of comparison with previous fiscal years, OIP has adjusted its FY 2019 numbers throughout this declaration. The unadjusted number of requests received by OIP is 1,375 (an annual pace of 2,750).

⁵ During the Bush administration (FY01 through FY08), OIP received an average of 1,046 requests per fiscal year, and never more than 1,342 in any one fiscal year. During the Obama administration (FY09 through FY16), OIP received an average of 1,515 requests per fiscal year, and never more than 1,803 in any one fiscal year. During the first two years of the Trump administration (FY17 through FY18), OIP has received an average of 3,170 requests per fiscal year, and never less than 2,818 in either fiscal year.

therefore essential that OIP continues to identify new efficiencies in our FOIA processing methods to ensure that the management of our FOIA caseload is as dynamic as the breadth, complexity, and volume of the FOIA requests being received by OIP. For this reason, and as discussed in great detail below, OIP recently assessed the impact of litigation on FOIA processing timelines and concluded that we can no longer prioritize searches for requests simply because litigation has been filed, due to the disproportionate and inefficient effect such prioritization has on our ability to process all other non-litigation requests. Such prioritization is unfair and harms other requesters with equally meritorious requests who have been in the queue for a longer period of time, and the filing of a lawsuit should not be a basis for moving ahead of other requesters in the queue.

11. In FY 2016, OIP received 1,803 FOIA requests, which at that time was the most requests ever received by OIP in a fiscal year.⁶ In FY 2017, requesters set another new record by submitting 2,818 new FOIA requests to OIP, representing a 56.3% increase from the prior year. Then, requesters set yet another record in FY 2018 by submitting 3,523 new FOIA requests, representing a 25.0% increase from FY 2017, a 95.4% increase from FY 2016. The FY 2018 total is double the number of requests received less than four years ago, in FY 2015 (1,762). To date, OIP is on pace to receive 3,082 requests in FY 2019 (adjusted number). While

⁶ Although other presidential election cycles and subsequent presidential transition periods have produced a bump in FOIA requests, the extreme nature of the mid-FY 2016 spike, and the duration and intensity of the successive surge of incoming requests was not anticipated by OIP, and could not have been anticipated. For example, during the Clinton/Bush II transition, OIP's incoming requests increased only 8.7% (from 965 in FY 2000 to 1,049 in FY 2001). During the Bush/Obama transition, OIP experienced a 22% increase (from 904 in FY 2008 to 1,103 in FY 2009). Thus, although some increase in the number of requests received was anticipated, the 56.3% increase during the Obama/Trump transition period—more than 2.5x that of the prior transition—certainly was not.

this projects to be a decline from FY 2018, it also projects to be the second-most requests ever received by OIP in a fiscal year.

12. Since FY 2014, OIP has succeeded in processing more FOIA requests each year. In FY 2014 and 2015, OIP processed 1,265 and 1,528 FOIA requests, respectively. In FY 2016, OIP processed 2,054 FOIA requests, the most requests it has ever processed in a fiscal year. In FY 2017 and FY 2018, OIP eclipsed that record when it processed 2,113 and 2,790 FOIA requests, respectively. As a result of the ongoing surge in requests and litigation and the compounding exceptional circumstances experience in the past year, OIP may be unable to process more requests in FY 2019 than last year, but it is still on pace to process nearly 2,000 requests by the end of FY 2019.

13. The below graph illustrates the upward trend in incoming requests received and processed by the IR Staff from FY 2001-2018 and clearly portrays the notable spike in requests which began during FY 2016, and continued through FY 2018:



14. As a result of the substantial increase in incoming FOIA requests, despite record numbers of requests processed, OIP's request backlog⁷ has also increased. At the end of FY 2016, OIP's backlog contained 578 FOIA requests. At the end of FY 2017, OIP's backlog skyrocketed to 1,209 FOIA requests, and it further expanded to 1,926 at the end of FY 2018. As of March 26, 2019, there were 2,294 FOIA requests in OIP's backlog.

15. Additionally, as of March 29, 2019, OIP is currently engaged in ninety-six ongoing FOIA litigation matters, approximately fifty-three of which still require records searches or document production schedules to be completed. This represents a significant 28.0% increase from the seventy-five litigation matters in which OIP was involved as of March 19, 2018, a substantial 95.9% increase from the forty-nine litigation matters in which OIP was involved as of March 20, 2017, and an even more staggering 231.0% increase from the twenty-nine litigation matters in which OIP was involved as of March 21, 2016.

16. The below table summarizes the data demonstrating the increases in OIP's received, processed, and backlogged requests, going back to FY 2008, and in litigation since March 2016:

	<u>Received</u>	<u>Processed</u>	<u>Backlog</u>	<u>Litigation</u> ⁸
FY08	904	956	236	
FY09	1,103	988	361	
FY10	1,378	1,302	411	
FY11	1,410	1,376	469	
FY12	1,686	1,707	428	
FY13	1,548	1,569	421	
FY14	1,434	1,265	593	
FY15	1,762	1,528	827	
FY16	1,803	2,054	578	29 (03/21/16)
FY17	2,818	2,113	1,209	49 (03/20/17)
FY18	3,523	2,790	1,926	75 (03/19/18)

⁷ Backlog is defined as the total number of pending FOIA requests that have not been responded to within the statutory time limit.

⁸ OIP did not routinely track litigation statistics until March 2016.

FY19⁹ 1,541 964 2,294 92 (03/18/19)

Impact of this Ongoing and Unprecedented Surge on OIP Resources

17. As stated in paragraph 1, above, the IR Staff is responsible for processing FOIA requests seeking records from within OIP and from six senior leadership offices of the DOJ, including OAG, ODAG, PAO, and OLP. Because of the significant surge in FOIA requests received, the ever-increasing complexity and breadth of those requests and the amount of data implicated by the searches and records processing, and dramatic increase in pending litigation, the IR Staff, which currently consists of seven full-time employees, five reviewers, and one contractor, is under significant strain to keep up with this dramatically increased workload.

18. In addition to the increase in overall backlog of FOIA requests, the surge in incoming FOIA requests has also created backlogs at each stage of OIP's search and review process, described in more detail below, and has resulted in a significant increase in the time necessary to conduct electronic searches and review the documents for responsiveness and release under FOIA after the searches are completed. Moreover, there has been a notable increase in the complexity and breadth of records searches and the volume of electronic data implicated in these records searches over the past three years.

Exceptional Circumstances Arising Within the Last Year

19. In addition to OIP's ever-increasing volume of incoming FOIA requests, OIP confronted two major obstacles over the course of the last year, each of which contribute to the exceptional circumstances faced by OIP in this case.

20. First, in late May 2018, OIP detected an anomaly in the results of a particular records search. OIP reported this to the Justice Management Division, Office of the Chief

⁹ See note 4, *supra*.

Information Officer (JMD/OCIO), which provides IT services and operations for OIP, and which exclusively conducts email and electronic records searches for the IR Staff. JMD/OCIO looked into this matter and ultimately discovered a technical issue impacting the electronic records searches JMD/OCIO had conducted for a significant number of OIP's FOIA requests, in addition to electronic records searches JMD/OCIO had conducted for other DOJ components. As a team with exhausted resources and already under immense pressure to keep up with records search requests, from OIP and multiple other components, and for FOIA and non-FOIA purposes, this technical issue was, candidly, devastating for JMD/OCIO. The fallout from this technical issue has lasted for over half a year and is just finally beginning to come to an end. During this time, JMD/OCIO had no choice but to divert significant resources into conducting a thorough inventory of its systems to ensure that all searches were run against a full set of data. As part of this inventory, JMD/OCIO staff was required to review searches that they had run for a year's worth of data and conducted a custodian-by-custodian review of all affected search custodians. Once JMD/OCIO identified the list of impacted searches, they then undertook the work of remediating all data underlying each search before re-running each search against that remediated data. During the course of these remediation efforts, JMD/OCIO suffered another major setback when a second technical issue occurred during what was supposed to be a routine software upgrade. These circumstances in and of themselves are truly exceptional, and further compounded the immense pressures resulting from the surge of FOIA requests received by OIP and by other components for which JMD/OCIO conducts records searches.¹⁰ Consequently,

¹⁰ The technical issues discussed in this section are further discussed in more detail in the declaration of Joseph Klimavicz, Chief Information Officer for the DOJ, filed in *Lawyers' Committee for Civil Rights Under Law v. Dep't of Justice*, No. 18-cv-00167 (D.D.C. Oct. 5, 2018), ECF. 25-1. The Klimavicz declaration is attached hereto as Exhibit C.

nearly all of JMD/OCIO's resources were devoted to remediating these technical issues, conducting searches for litigation matters with court-ordered deadlines, and other Departmental priorities, all at the expense of non-litigation FOIA requests submitted to OIP.

21. Second, both OIP and JMD/OCIO suffered the consequences of a thirty-five day lapse in appropriations to the DOJ, resulting in the longest shutdown in American history. OIP and JMD/OCIO personnel were prohibited from working on FOIA matters for the duration of the shutdown (in fact, the entire IR staff was prohibited from working at all). However, OIP's website remained active to the requester community and, over the course of these thirty-five days, OIP continued to receive a high volume of requests, despite the fact that OIP was unable to actively engage in its normal request intake process, to continue processing requests, or to work on other time-sensitive matters, such as court-ordered deadlines. Similarly, JMD/OCIO was not able to engage in its normal intake process with regard to records search requests from OIP and other components of the DOJ. Further, JMD/OCIO could not work on other time-sensitive matters, such as those with impending litigation deadlines. This inability to work on ever-accumulating, preexisting deadlines as new FOIA requests continued to pour in resulted in a compounding of competing court deadlines and ratcheted up pressure on the IR Staff and JMD/OCIO staff.

22. In spite of these additional exceptional circumstances, the IR Staff and JMD/OCIO have continued to make progress in their efforts to address their backlogs, and they have re-doubled their efforts to find new ways to more efficiently approach and respond to the ever-increasing volume of incoming FOIA requests.

OIP's Efforts to Respond to the Exceptional Circumstances

23. As detailed above, both the number of incoming FOIA requests and the number of requests subject to litigation began to surge approximately three years ago and have continued to do so at unprecedented levels. This was on top of already strained and nearly fully exhausted IR Staff resources, resulting from a years-long trend of increasing numbers of incoming requests and litigation. In an effort to ensure that OIP was able to meet litigation-related deadlines, while also still making inroads into reduction of its non-litigation FOIA backlog, OIP proactively began to examine and modify its intake process and the way it processes FOIA requests in order to improve efficiencies in the IR Staff's FOIA processing system, structure, staffing, and search methods.

24. Midway through FY 2016 (coinciding with the above-referenced FOIA request and litigation spikes), OIP undertook a comprehensive review of IR Staff organization and procedures to identify opportunities to create additional efficiencies, surveyed other agencies and DOJ components to learn from their successes and best practices in reducing FOIA request backlog and, as a result of this careful analysis, completely reorganized the IR Staff and its request-processing structure. As opposed to the former IR Staff structure in which individual staff members processed each and every FOIA request received from start-to-finish, this newer more efficient model implemented a more agile team-centric approach that better aligned with OIP's existing multi-track processing system in which requests are processed on a first-in, first-out basis within the "expedited," "simple," and "complex" tracks.¹¹ For example, OIP observed

¹¹ OIP made substantial progress in the processing of its FOIA requests as a result of this restructuring, and mid-way through FY 2019, after a series of exceptional obstacles discussed in the previous section, OIP worked with JMD/OCIO to implement an even more aggressive restructuring of JMD/OCIO's search process, now conducting searches on a first-in, first-out

that “simple track” requests, which entail less time and/or work to process¹² and which, ideally, could be processed within the FOIA’s statutory time limits, were not being processed as quickly as they could be, largely because each individual IR Staff member was facing a growing backlog of assigned requests, all with competing interests, priorities, and deadlines. One IR Staff member alone might have been assigned several hundreds of requests, including “simple track” requests which require immediate attention in order to complete quickly; “complex track” requests which require careful and time-intensive searches and records review, often involving sensitive or classified records implicating many other DOJ or agency equities; “expedited requests” which are required under the FOIA to be processed “as soon as practicable”;¹³ and lastly, requests in litigation, which demand the highest priority on staff members’ time in order to ensure that court deadlines and obligations are being fulfilled.

25. OIP’s immediate response to the FY 2016 spike in incoming FOIA requests was to completely reorganize the IR Staff, beginning with the development of a dedicated team focused on intake of new requests, search initiation, requester negotiations, and “simple track” requests—i.e., tasks requiring speed. As a direct result of this reorganization, OIP’s “simple track” processing time improved significantly, and by FY 2017 fell to an average of 22.04 days from 35.32 days in FY 2015. Another key element of the IR Staff reorganization allowed other IR

basis within seven search queues, which are distinguished by the number of search custodians implicated by a given request.

¹² DOJ FOIA regulations state that components “may also designate additional processing tracks that distinguish between simple and more complex requests based on the estimated amount of work or time needed to process the request. Among the factors a component may consider are the number of pages involved in processing the request and the need for consultations or referrals. Components shall advise requesters of the track into which their request falls and, when appropriate, shall offer the requesters an opportunity to narrow their request so that it can be placed in a different processing track.” 28 C.F.R. § 16.5(b) (2017).

¹³ 28 C.F.R. § 16.5(e)(4).

Staff members the time needed to focus on more complex requests, including expedited requests, which might not have been possible had the competing demands and constant “to-dos” of faster-turnaround cases and actions remained in their caseload. Again, OIP observed direct and notable improvement as a result—and was able to greatly improve overall processing metrics (*see, e.g.*, ¶¶ 12-13, *supra*) and achieve reduction in the age of our oldest pending FOIA requests.¹⁴

26. Unfortunately, a number of staffing departures over the past year and the continuing rise in resources demanded by FOIA litigation and increasingly complex requests resulted in OIP only being able to devote three to four employees¹⁵ to processing all non-litigation FOIA requests (a great feat considering OIP received over 3,500 requests in FY 2018). This feat became even greater after the government shutdown. For several weeks after funding was restored on January 25, 2019, these three to four staff-members have spent virtually all of their time solely processing the intake of new FOIA requests, preparing acknowledgment letters, reviewing and making determinations on requests for expedition, and initiating searches. To be clear, unless a FOIA request was the subject of litigation, there were very limited resources to process it. Given the strain on OIP’s resources, we have begun to make tweaks to streamline our intake process, and just recently, we hired a contractor whose time is fully dedicated to the intake of new requests, thus allowing the other three employees to dedicate more time to the processing of requests.

27. Although OIP was able to hire this contractor, the IR Staff has not been able to substantially increase staffing levels, or even to backfill all existing open staff positions, due to

¹⁴ At the start of FY 2018, for example, OIP’s oldest pending FOIA request was seven months “younger” than the oldest pending request at the start of FY 2017.

¹⁵ At the start of FY 2019, OIP had four staffers handling non-litigation requests. After a staff departure, that number fell to three. Shortly thereafter, OIP hired a contractor who has filled the gap created by this previous departure.

budgetary constraints. Nevertheless, OIP is doing everything possible to work within existing budgetary constraints and has responded to the overwhelming surge in requests by reallocating staffing resources within the Office. On an *ad hoc* basis, staff members from OIP's other teams (i.e. the Appeals and Compliance Staffs) have assisted with the IR Staff's work, including, in particular, work on especially complex, voluminous, and time-intensive or time-sensitive requests. Over the last year, the IR Staff has permanently procured two senior reviewing attorneys from another team within the Office, one as recently as December, shortly after litigation commenced in the present case. During FY 2017 and FY 2018, OIP sought and obtained limited exceptions to hire experienced attorneys to aid in the processing of FOIA requests both in and out of litigation, but with the substantial increase in litigation and court-ordered deadlines, these attorneys now solely work on litigation matters.

28. Although the reorganization and staffing actions discussed above have greatly improved the IR Staff's productivity, improved "simple track" processing times, and allowed renewed focus on effectively addressing backlog reduction, OIP's FOIA backlog continues to increase dramatically due to exceptional circumstances discussed above in paragraphs 9 and to 22. OIP's electronic records search backlog (including delays both within OIP directly, and within JMD/OCIO's electronic search support team) also continues to increase for the same reasons.

Impact of Litigation on OIP's FOIA Process

29. Of particular relevance in the instant case, the surge in complex electronic records searches required for requests subject to litigation has dramatically reduced OIP's ability to respond efficiently to non-litigation requests requiring similar electronic records searches, because OIP and its electronic records search support team within JMD have had to continually

shift litigation searches to the front of the electronic search queue. For example, requesters who choose not to litigate, including those whose own requests implicate significant or newsworthy topics of considerable public interest, will have their place in the first-in, first-out search queue repeatedly shifted back as requesters who file suit are repeatedly moved ahead in line. Not only is this constant reshuffling of search priorities inefficient, both for OIP and for its JMD/OCIO search support team, it is self-perpetuating in that, the more litigation requests are prioritized, the more it encourages requesters to file litigation. This constant and continuous reprioritization has the unfortunate effect of essentially overriding OIP's multitrack, first-in, first-out processing system and disadvantaging requesters who do not file suit, by pushing all other non-litigation requesters, including those appropriately granted expedited processing or who have worked with OIP to narrow the scope of their requests, behind litigation requests, regardless of how long they have been waiting in the search queue.

30. In addition to the inefficiencies created by prioritizing FOIA requests subject to litigation, resulting in the disproportionate and inequitable delay on non-litigation requests, the staggering increase in litigation matters—tripling in the past three years—has also dramatically affected the time necessary to complete electronic records searches. In order to address this disproportionality, OIP concluded in March 2018 that it could no longer prioritize litigation requests, particularly in the electronic search queue, simply because a requester has filed a lawsuit.

31. To demonstrate the impact of prioritizing litigation above all other requests in the search queue: requests subject to litigation make up about 5% of all electronic records searches pending with JMD/OCIO. Yet, for roughly the first half of FY 2018 (before OIP affirmatively determined that it will no longer prioritize electronic records searches simply because of pending

litigation), almost half of the searches completed by JMD/OCIO were for litigation requests. In other words, the 5% of litigation requests in JMD/OCIO's backlog staggeringly accounted for nearly 50% of the electronic records searches completed. Moreover, all of the non-litigation searches completed the first half of FY 2018 involved relatively small/narrow searches – resulting in locating a volume of records averaging a tenth of the size of our average litigation search. Put differently, the result of prioritizing litigation over everything else in the backlog was that OIP's search support team could only complete “smaller” searches for pending non-litigation requests, leaving larger and more complex searches languishing for extended periods of time.

32. Shortly after OIP stopped prioritizing litigation searches, OIP observed that two-thirds of the electronic records searches completed were for non-litigation requests. This indicates that OIP's decision to stop re-shuffling searches based purely on the filing of a lawsuit has already resulted in a marked increase in productivity for completing records searches in the 95% of OIP's pending requests that are not subject to litigation. Unfortunately, as discussed above, a few months after this shift in priorities created a definitive increase in productivity, JMD/OCIO discovered a technical issue impacting previous searches it had run and had no choice but to prioritize remediation of all impacted searches, particularly those that were the subject of litigation. This setback was further compounded by the discovery of a second technical issue and then by a lapse in appropriations, requiring OIP and JMD/OCIO to cease their operations for thirty-five days. These events again necessitated that JMD/OCIO prioritize searches with court-ordered deadlines at the expense of cases that were not in litigation. Now that time has passed, OIP is beginning to move back toward its intended, dynamic process whereby it processes requests on a first-in, first-out, multi-track basis. OIP has also directly and

aggressively responded to these exceptional circumstances by working with JMD/OCIO to restructure its search process, and JMD/OCIO has itself taken proactive steps to address its backlog. These changes will be discussed further in the next section.

OIP's Electronic Records Search Process

33. Incoming FOIA requests to OIP are assigned to a Government Information Specialist (GIS). OIP makes determinations upon receipt of a FOIA request, both as to the appropriate senior leadership office or offices for which to conduct initial records searches, and as to the appropriate records repositories and search methods to use in conducting records searches on behalf of the designated senior leadership offices. Assessments of where responsive records are likely maintained are based on a review of the content of the request itself and the nature of the records sought therein, as well as our familiarity with the types and location of records that each senior leadership office maintains, discussions with knowledgeable personnel in the senior leadership offices, and any research that OIP staff may conduct on the topic of the request. When searching the records of leadership office custodians identified as potentially having responsive material, OIP staff employ any one of a variety of search methods, or a combination of methods, depending on a number of factors, including the type of records systems implicated in the search. Potentially responsive records may be located in email systems, electronic files, hard-copy (paper) files, and/or any other locations implicated by the nature of the requested records.

34. Email and other electronic records searches are conducted using a sophisticated electronic e-discovery system that searches through a named records custodian's email and electronic computer files to isolate potentially responsive records within each custodian's collection of digital records. Because of the technical nature of these searches, OIP's electronic

searches are conducted by a specialized e-discovery/search support team within a separate component of the Department—JMD/OCIO—using search parameters and terms provided by OIP staff.

35. When processing a FOIA request implicating records maintained by one or more of the senior leadership offices, OIP typically initiates records searches by sending a search notification email to the specific office(s), which notifies the office(s) of the receipt of the request and informs personnel that OIP will conduct an electronic search of records maintained by relevant staff members within that office. This notification also initiates a dialogue and provides the leadership offices with the opportunity to inform OIP’s search by identifying particular staff members who are most likely to maintain potentially responsive records, to identify other types of records systems that may need to be searched, and/or to provide guidance to OIP regarding search parameters based on the subject-matter expertise of the office(s) implicated.

36. Based on any pertinent information provided by the individual senior management office regarding the scope of the records search, combined with OIP’s research regarding the topic of the request, our assessment of the potential records custodians, and the records implicated by the request, the OIP staff member who is assigned to process the FOIA request creates a “data request form.” This form identifies the relevant custodians, search time-frame, types of electronic records to be searched, and search terms. Once the data request form undergoes an internal review process, to ensure that the search is appropriately tailored to the request and records at hand, the data request form is submitted to the JMD/OCIO e-discovery/search support team, which then conducts the requested searches of senior

management email accounts and electronic computer files for OIP using the e-discovery platform referenced above.

37. Upon receipt of OIP's data request form, JMD/OCIO staff trained on the e-discovery system then undertake a series of steps to complete the search. First, JMD/OCIO staff research the email and electronic accounts of each custodian identified in OIP's data request form, to ensure that the correct account data for each custodian are located and searched.¹⁶ Each custodian's relevant account data must then be located, indexed, and collected into the e-discovery system by a search team member operating the e-discovery search application. Once the data for all custodians are replicated and loaded into the e-discovery system, OIP's search parameters are run across the full data collection, and relevant items (emails, attachments, electronic calendars and/or stand-alone electronic documents from custodian's computer files) are extracted from the e-discovery platform, and reimported into a new data-set within the platform containing only the information that is responsive to the search parameters. At key stages throughout this process, OCIO search team members initiate quality assurance protocols to ensure that the relevant data is successfully retrieved. Upon completion of these processes, access of the search result data is granted to OIP staff for review through the e-discovery platform.

38. While the time needed to complete each search request submitted by OIP will vary depending on a number of factors, including the number and size of each records custodian's accounts and any technical issues that may arise with the data therein, OCIO's search team is able to complete the entire search process at an average rate of 1.5 hours per search custodian.

¹⁶ Because custodians sometimes move across different roles and offices during their DOJ careers, any one custodian may have multiple DOJ accounts. This step in the search team's process is thus critical to ensuring that all relevant data is retrieved for OIP's searches.

The number of search custodians implicated in each search request is the primary factor in the OCIO team's search completion time.

39. Over the past few years, OIP has received increasingly complex FOIA requests, often requiring more and more custodians to be searched. Because the number of custodians implicated in a search is the driving factor in the length of time required to complete a search, OIP has worked with JMD/OCIO over the past couple months to reorganize its search process by expanding the number of searching queues used in their process. These searching queues are distinguished from each other by the number of search custodians required to be search. As previously discussed with regard to OIP's processing tracks—"expedited," "simple," and "complex"—this type of refined process allows JMD/OCIO to more efficiently and effectively run searches for simpler/narrower requests, which may be processed and completed more quickly when they are not buried in the search request queue behind larger, more complex requests. This updated process should reduce the backlog by allowing OIP to receive and process records more quickly, allowing OIP to close more cases in the days allocated by the statutory deadline, thereby significantly decreasing the likelihood that requesters will turn to litigation as their primary means for receiving a response to their FOIA request.

40. Additionally, JMD/OCIO has proactively and diligently taken steps on its own to address its search backlog. First, a couple years ago, JMD/OCIO began by actively maintaining preemptively-indexed data for certain former Department employees whose electronic records are frequently sought in OIP's FOIA requests, which substantially reduces the time necessary to provide search results from these custodians' accounts upon request from OIP. This allowed JMD/OCIO to complete searches, on average, five times faster per month than they had in FY 2014. Second, between October 2018 and February 2019, JMD has assigned four additional

employees to the existing JMD/OCIO team of four responsible for completing the IR Staff's records searches. These new team members were added in order to help with backlog reduction, identify and implement improvements, and to supplement the operations of the team.¹⁷ Third, since October 2018, JMD/OCIO has conducted a thorough review of its existing infrastructure and is identifying and remedying current bottlenecks in its processes, use of applications, and storage. It is also actively investigating alternative solutions, including the possibility of utilizing outside providers to outsource certain search functions, which could substantially speed up the records search process. Finally, JMD/OCIO is restructuring its intake process to build in efficiencies, such as identifying cases that may be worked in tandem, thus cutting down on total processing time. This restructuring includes modifications to the way JMD/OCIO tracks its cases, thus allowing JMD/OCIO staff to more efficiently collaborate and reduce redundancies in the work that each staff-member is doing. This process is also designed to provide an additional safeguard against future technical issues and to identify any such technical issues earlier in and throughout the records search process. JMD/OCIO is confident that over the next twelve months, all of these steps, taken together, will result in a significant reduction in their backlog and improve the timeliness of responses overall.

41. Historically, OIP has calculated that on average the number of search custodians implicated in a given search is approximately twenty (with requests ranging anywhere between one and upwards of ninety-two search custodians). Applying JMD/OCIO's average search rate of 1.5 hours/custodian means that an individual search could take anywhere between 1.5 and 138 person-hours to complete, with an average of 30 working hours for one JMD/OCIO employee to

¹⁷ These team members are helping out in the ways described in this paragraph and are undergoing training to assist in conducting searches on their own.

complete each search.¹⁸ With 506 electronic records searches submitted by OIP and currently pending with JMD/OCIO, the total time it would take JMD/OCIO to complete all searches, at its current staffing levels, would be approximately 15,180 person-hours (translating to 379.5 weeks or 7.3 years).¹⁹

42. The JMD/OCIO search team which handles OIP's electronic records searches now consists of a total of four people (with four additional people recently added to the team to provide support and who, upon completion of training, will be in a position to conduct electronic records searches). The statistics at the end of the previous paragraph do not even take into account the fact that in addition to OIP's electronic searches, these eight employees provide e-discovery and FOIA search support for many other DOJ functions, including other components' FOIA searches and records searches for Congressional inquiries,²⁰ Inspector General requests, and litigation holds.

43. Although OIP's utilization of JMD/OCIO's services represents just one aspect of the OCIO search team's portfolio, OIP's FOIA records searches on behalf of the DOJ senior leadership offices make up the largest share of the search team's work. Accordingly, OIP's skyrocketing increase in incoming requests, particularly in requests requiring complex electronic searches, has had a direct, measurable, and proportionate impact on the OCIO search team's workload. The number of searches completed by JMD annually, the number of search

¹⁸ The search for Plaintiff's request includes 13 custodians and is therefore projected to require approximately 20.5 hours of OCIO search time.

¹⁹ As JMD/OCIO's efforts to address its backlog bear fruit, including the full integration of the four employees recently added to its search team, OIP and JMD/OCIO anticipate that they can move more quickly through these searches.

²⁰ The Department as seen a substantial increase in Congressional requests for records productions during the current Congress, which on top of everything else has further strained JMD/OCIO's resources.

custodians implicated in these cases, and the total volume of data captured by these searches, have each increased substantially over the past few years. For example, the number of searches completed annually by the OCIO team increased five-fold from 37 to 185 from FY 2014 to FY 2017. The number of records custodians implicated in these cases increased, staggeringly, nearly ten-fold from FY 2014 to FY 2017: from 218, to 2,065 in FY 2017. The volume of data searched by the OCIO team also increased at an astounding rate, from 1,672 gigabytes in FY 2014, to 23,827 gigabytes by mid-FY 2018. These ever-expanding search, custodian, and data volumes are indicative of the increasing complexity of the searches being conducted, thus requiring increasingly more time and resources to complete. Further, the processing of any records located by these increasingly complex and broad searches, is itself increasingly complex and time-consuming.

44. Once the search results are provided to OIP by the OCIO search team, the GIS or, for requests subject to litigation, Attorney-Advisor assigned to the request undertakes an initial survey of the universe of potentially responsive records collected by the search. At this time, secondary searches may be run across the search results in order to isolate potentially responsive records. These secondary searches are informed by the IR Staff member's assessment of the search results, including evidence of "false positives" retrieved by the search keywords but otherwise clearly unrelated to the topic of the request. If the search results are voluminous, OIP staff frequently engage in conversations with requesters to narrow or target the specific types of records being sought, after which further searches are conducted within the data collection to isolate these records. OIP staff may also create and employ a variety of data "tags" to organize and categorize the search results – which further informs discussions with requesters about the

search results, and which facilitates the development of an organized review and processing plan for the potentially responsive records.

45. Once the initial survey, requester outreach, secondary searches, and records categorization, as applicable, are completed, the GIS or Attorney-Advisor then conducts a document-by-document review of the potentially responsive records universe. Depending on the complexity of the records, a second-level review may be required at this time. Records identified as responsive based on this document-by-document review are then exported out of the system and into an internal OIP shared network drive for processing.

OIP's Handling of Plaintiff's Request

46. As discussed above, Plaintiff submitted its FOIA request on August 14, 2018. Plaintiff's request seeks various records pertaining to the Religious Liberty Task Force (RLTF) since September 1, 2017. Plaintiff identified possible custodians within four of OIP's client Offices—OAG, OASG, PAO, and OLP—and OIP confirmed that it is reasonable to conduct searches within these four Offices. Accordingly, on December 11, 2018, OIP sent search notifications to OAG, OASG, PAO, and OLP, advising these Offices of the request and initiating a search in those Offices.

47. To date, OIP has already completed a search within the Departmental Executive Secretariat (DES), which is the official records repository of OAG, ODAG, OASG, and OLA and maintains records of all formal, controlled, unclassified correspondence sent to or from those Offices from January 1, 2001, to the present day. OIP has also completed a search of "retired files," which consist of paper records and "printed-to-file" electronic records (including email) for departed Department Employees. OIP has processed many of the records located by these searches and is issuing a release of responsive records to Plaintiff, with appropriate exemptions,

contemporaneous with the filing of this declaration. The response letter accompanying OIP's release is attached hereto as Exhibit D.

48. Further, as discussed above, one of the strategies employed by OIP and JMD/OCIO is to leverage searches that have already been conducted. OIP just recently gained access to all of Attorney General Sessions' emails and electronic files, and OIP is prepared to conduct a search within these records and begin processing responsive material, if any, for a second interim response to Plaintiff during the pendency of the remaining searches to be conducted by JMD/OCIO. After OIP has an opportunity to conduct a preliminary review of this material, OIP will be prepared to discuss with Plaintiff timing for a second interim response.

49. To date, OIP has taken all reasonable steps to conduct searches and process records responsive to Plaintiff's request. However, given its significant backlog of email and electronic records searches, OIP is not in a position to process Plaintiff's FOIA request in its entirety any more quickly without displacing other equally-meritorious FOIA requests, many of which are expedited or narrower, and many of which are on equal-footing in terms of the number of custodians to be searched.

50. Plaintiff's request is in the "complex" processing track for processing purposes and OIP informed Plaintiff of that fact on August 23, 2018. After the instant litigation was filed, counsel for OIP engaged in a dialogue with Plaintiff's counsel, advising Plaintiff's counsel that the estimated search time was four to seven months.

51. Since the creation of new JMD/OCIO search queues last month (now totaling seven queues), Plaintiff's request was placed in a search queue for requests requiring a search of 11 to 25 custodians. There is a narrower queue for requests requiring a search of only 4 to 10 custodians, and one even narrower for only 1 to 3 custodians. OIP welcomes the opportunity to

further discuss these new search queues with Plaintiff and the possibility of narrowing the scope of Plaintiff's request so it can be moved to a faster search queue.

52. Currently, Plaintiff's FOIA is positioned at number eighty-two out of a total 101 cases within its search queue. In the ordinary course of business, search requests are conducted on a first-in, first-out basis within a given queue.²¹ There are 238 searches ahead of Plaintiff's, either within the same queue, in narrower queues, or in the expedited queue.²² Applying the JMD/OCIO search team's rate of 1.5 hours/custodian, and factoring in the average number of custodians per search request,²³ JMD/OCIO staff would need to expend approximately 4,642.5 person-hours, or 116.74 working person-weeks, before Plaintiff's request (which would itself be projected to take 20.5 person hours to complete) comes to the front of the queue. Even if all four OCIO search team members were able to commit 100% of their time to OIP's FOIA searches (notwithstanding their other Departmental responsibilities), Plaintiff's request would take a projected 29.18 weeks, or approximately seven and a quarter months, to complete. OIP initially estimated that July was the outer limit of the time it would take to conduct the search in this case. However, after the reorganization of JMD/OCIO's searching queues, OIP now estimates that this search will be completed in early to mid-November. As noted above, Plaintiff still has the opportunity to sufficiently narrow the number of custodians to be searched in order to move this

²¹ It should be noted that while first-in, first-out is the general order, other variables may affect the precise order in which searches would be completed – such as, for instance, whether the searches include frequently-requested custodians' files which are pre-indexed as part of OCIO's streamlined process or where two or more searches could be conducted in tandem given overlapping records sought by requesters. *See, e.g.*, ¶ 40, *supra*.

²² As JMD/OCIO works its way through any given queue, it will contemporaneously be working its way through all other queues.

²³ OIP has determined that the average number of custodians in its "expedited" queue is twenty, in its narrowest queue is two, in its second narrowest is seven, and in the queue where Plaintiff's request is located is eighteen.

request into a faster queue. It is worth noting that as JMD/OCIO's recently added employees complete training, and as JMD/OCIO's other recent changes bear fruit, OIP is hopeful that JMD/OCIO will be able to complete these searches in a shorter timeframe; if so, OIP will promptly notify Plaintiff and the Court when the search is completed.

53. For the reasons discussed above, OIP requests that the Court enter a stay through November 26, 2019, to allow Defendant to complete its search for any records responsive to Plaintiff's FOIA request, complete a preliminary review any potentially responsive agency records that are subject to the FOIA that it collects, and confer with Plaintiff over a processing schedule. Given the dramatic surge in incoming FOIA requests and litigation matters, which have caused a significant increase in the time necessary to conduct adequate electronic searches, a stay would allow for OIP to continue its administrative process in conducting its search for records. Denial of a stay in this matter would require OIP and JMD/OCIO to prioritize the electronic records search in this request to the disadvantage of other similarly situated requesters.

OIP Only Files This *Open America* Stay Because it Faces Truly Exceptional Circumstances

54. OIP recognizes that the purpose of an *Open America* stay is to allow an agency additional time to process a FOIA request where *exceptional* circumstances exist, and this is not a remedy to be abused or used in perpetuity. OIP is in the midst of an ongoing and unprecedented surge of incoming FOIA requests, which is out of step with historical trends, and the duration and magnitude of which could not have been predicted by OIP. That in and of itself poses an exceptional circumstance. The fact that this surge coincided with not one, but two distinct technical issues impacting OIP's searches, and the fact that this also coincide with the longest government shutdown in United States history makes the circumstances in which OIP finds itself truly exceptional.

55. Throughout this declaration, I have laid out the steps OIP and JMD/OCIO have already taken or are in the process of taking to confront these circumstances head-on. OIP is mindful that we must adapt to the ever-increasing number of FOIA requests, and to the complexity of the records searches required by these requests, and our staff is working hard to find new ways to adapt by optimizing resources, leveraging technology, and streamlining workflows to ensure it is fully prepared to handle the demands of what increasingly appears to be a “new normal.” We have not been complacent, we already have taken some fairly aggressive steps, and OIP and JMD/OCIO are continuing to evaluate the possibility of implementing even more aggressive courses of action which we are optimistic will allow us to demonstrate considerable progress over the course of the next year.

I declare under penalty of perjury that the foregoing is true and correct.



Vanessa R. Brinkmann

Executed this 29th day of March 2019.