UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, AMERICAN CIVIL LIBERTIES UNION OF MARYLAND, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, and AMERICAN CIVIL LIBERTIES UNION OF DELAWARE, Plaintiffs, v. U.S. DEPARTMENT OF HOMELAND SECURITY, and U.S. CUSTOMS AND BORDER PROTECTION, Defendants.	Case No.: 1:17-cv-00441-LMB-IDD

DEFENDANTS' NOTICE OF REPLY BRIEF FILED WITH THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

Defendants the U.S. Department of Homeland Security and U.S. Customs and Border Protection hereby provide notice that on June 6, 2017, Defendants filed with the United States Judicial Panel on Multidistrict Litigation a Reply in Support of Defendants' Motion for Transfer of Actions Pursuant to 28 U.S.C. § 1407. A copy of the Reply is attached.

Dated: June 6, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of June, 2017, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

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BEFORE THE UNITED STATES
JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE AMERICAN CIVIL LIBERTIES UNION FREEDOM OF INFORMATION ACT (FOIA) REQUESTS REGARDING EXECUTIVE ORDER 13769	**MDL Docket No. 2786**

REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR TRANSFER OF ACTIONS PURSUANT TO 28 U.S.C. § 1407

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Plaintiff ACLU affiliates have coordinated their filing of parallel FOIA requests seeking disclosure of identical categories of records; coordinated their filing of the thirteen materially identical complaints in the Related Actions; and, now, coordinated their opposition to Defendants' motion to transfer the cases so that they can be handled in the manner that imposes the least burden on the Government and the courts.[1] Plaintiffs do not dispute that they could have filed a single complaint to compel responses to all of the FOIA requests at issue in the Related Actions (as well as the four ACLU-coordinated FOIA requests not yet in litigation) or that one or two plaintiffs' attorneys would have sufficed to handle such a case, instead of the 46 plaintiffs' attorneys currently staffed on this case. *See* Mem. 13. While Plaintiffs apparently prefer to involve thirteen different courts and "46 different attorneys," Opp. 8, coordinating the pretrial proceedings in Plaintiffs' coordinated lawsuits would allow a single judge to resolve common questions of fact, serve the convenience of the parties, and ensure the just and efficient conduct of the actions.

The Panel should grant Defendants' Motion for Transfer and centralize the Related Actions in the District Court for the District of Columbia.

ARGUMENT

I. FOIA LITIGATION IS NOT EXEMPT FROM CENTRALIZATION

This Panel's precedents refute Plaintiffs' argument that "MDL transfer makes no sense in FOIA litigation." Opp. 6. The Government has twice invoked Section 1407 to request transfer of FOIA actions pending in multiple jurisdictions, and both times this Panel granted the Government's motion. *See In re Freedom Magazine/IRS FOIA Litig.*, No. 910 (J.P.M.L. Feb. 12, 1992) ("*Freedom Magazine* Transfer Order"); *In re Church of Scientology Flag Serv. Org./IRS FOIA Litig.*, No. 892 (J.P.M.L. Sept. 4, 1991) ("*Church of Scientology* Transfer Order").

[1] Mem. of Pls., 42 ACLU Affiliates, in Opp. to Defs.' Mot for Transfer (May 30, 2017), ECF No. 47 ("Opp."). Defendants' opening Memorandum, ECF No. 1-1, is cited as "Mem."

MDL treatment of FOIA actions has been rare, but that is because FOIA requesters rarely pursue parallel litigation involving parallel FOIA requests in multiple districts—a strategy that unnecessarily burdens both the Government and the courts. Unfortunately, that is how Plaintiffs have decided to proceed here, compelling Defendants to seek relief from this Panel.

There is no basis for Plaintiffs' contention that "delay and obstruction" are the Government's hidden "motive" for seeking transfer. Opp. 2; *see also id.* at 1, 7, 16. Their rhetoric notwithstanding, Plaintiffs do not explain how transfer would delay or obstruct anything.

The ACLU's eighteen parallel FOIA requests are broad, and the CBP's resources for processing FOIA requests are spread thin. *See* Mem. 12 n.6. Nevertheless, the agency is expediting its processing of all of the ACLU's parallel FOIA requests (as well as other requests for records regarding Executive Order 13769). This means the agency has "given priority" to Plaintiffs' requests and will process them "as soon as practicable." 6 C.F.R. § 5.5(e)(4).

To that end, CBP has been centrally coordinating a single search for records responsive to all of the ACLU's parallel FOIA requests—including those not yet in litigation—to ensure that the agency conducts an adequate search and processes responsive records for release in an efficient and consistent manner. The agency has already begun releasing responsive records[2] and anticipates releasing more shortly. It is making these releases without any court order and is committed to doing so whether or not the courts in which the cases are now pending grant Defendants' motions to stay proceedings pending a decision on Defendants' transfer motion.[3]

[2] On April 18, 2017, the agency partially released two records responsive to certain parts of the FOIA request at issue in the Southern District of Texas. *See* Opp. 2 n.1. The form cover letter erroneously stated that this was the agency's "final" response. The agency has not completed its processing of records responsive to any of the FOIA requests at issue.

[3] While the litigation is not dictating the pace of CBP's processing of the FOIA requests, the litigation itself might have progressed faster had Plaintiffs not multiplied the proceedings unnecessarily. Responding to one lawsuit requires less time than responding to thirteen.

Centralization is consistent with the FOIA and is more likely to facilitate than impede efficient resolution of these Related Actions because it would permit the agency and its counsel to concentrate their resources on one proceeding instead of thirteen.

II. THE RELATED ACTIONS INVOLVE COMMON QUESTIONS OF FACT

The Related Actions involve common questions of fact for the same reasons that *Freedom Magazine* and *Church of Scientology* involved common questions of fact. Mem. 9–11. To wit, the FOIA requests at issue all relate to the same subject matter—indeed, they all "use the same language to request documents," Opp. 8—and the agency's national office is coordinating the search for and processing of responsive records. Mem. 9. Therefore, any disputes about the adequacy of the agency's search, its application of the FOIA's statutory exemptions from disclosure, and the pace of its releases will involve common questions of fact. *Id.* at 2, 9–11.

Freedom Magazine forecloses Plaintiffs' principal argument, which is that the Related Actions do not involve common questions of fact because the FOIA requests are "limited to *local records*," so "any factual disputes . . . will revolve around compliance within each *local* CBP field office." Opp. 1. The Panel held in *Freedom Magazine* that litigation over FOIA requests made to different agency offices presented common factual questions because the requests were "identically worded" and because the agency "forwarded all such requests to its national office for coordinated treatment." *Freedom Magazine* Transfer Order at 1.

Unable to meaningfully distinguish *Freedom Magazine*, Plaintiffs merely assert that these cases are different because "the FOIA requests are explicit in disclaiming any request for documents in the District of Columbia." Opp. 12. But this point is irrelevant to whether FOIA requests for records from different offices may involve common questions of fact. And Plaintiffs' point ignores the ACLU's parallel FOIA request for records from CBP's headquarters. *See* Exhibit 17. The agency is obligated to process that FOIA request even though the ACLU has

so far refrained from filing suit concerning that request, and CBP is centrally coordinating the processing of that request with those at issue in the Related Actions, all on an expedited basis.[4]

Plaintiffs insist that "factual differences between events in different jurisdictions," Opp. 9, mean that "unique factual questions will predominate" in any inquiry into search adequacy, *id.* at 11. But Plaintiffs' FOIA requests are not tailored to the events described in their Complaints. *Compare id.* at 9–10 (quoting Complaints), *with* Mem. 5–6 (quoting FOIA requests). Because Plaintiffs' FOIA requests all "use the same language to request documents," Opp. 8, "the adequacy of the search conducted by [CBP] for these records is . . . a potential issue in each action." *Church of Scientology* Transfer Order at 2. While different events in different jurisdictions may (or may not) mean that different field offices possess unique responsive records (in addition to duplicate copies of records also located at multiple offices), the adequacy of CBP's search will depend on its methodology. Mem. 10. And the search methodology should not differ significantly from one request to another when each request uses the "same language." *Cf. Leopold v. NSA*, 118 F. Supp. 3d 302, 309 (D.D.C. 2015) (finding an agency's search reasonable when it used search terms "taken directly from the request"). Thus, it is not merely that CBP is centrally coordinating the search that creates common issues, as Plaintiffs suggest, *see* Opp. 1, but that any search (centralized or not) would be guided by the "same language."

In a similar vein, Plaintiffs are wrong that Defendants will need to supply declarations from employees of each field office to demonstrate the reasonableness of the search that CBP headquarters is coordinating. *Id.* at 10; *see also id.* at 6, 17. Courts generally accept a declaration from the employee who coordinates a search and do not demand separate declarations from the

[4] Plaintiffs' effort to distinguish *Church of Scientology* fails for similar reasons. That "none of [the Related Actions] is pending in Defendants' preferred district," Opp. 12, has no bearing on whether the cases present common questions of fact.

personnel who implement the search. *See, e.g.*, *Lahr v. Nat'l Transp. Safety Bd.*, 569 F.3d 964, 990 (9th Cir. 2009); *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991). Consequently, Defendants anticipate that they are likely to rely exclusively on personnel from headquarters to supply any search declarations.

With regard to issues involving the exemptions from disclosure, Plaintiffs fail in their attempt to write off any potential disputes as presenting "irrelevant" "legal issues." Opp. 12. There are often "fact-intensive tasks which the district court must perform" in deciding whether the conditions for withholding information have been met. *Summers v. DOJ*, 140 F.3d 1077, 1083 (D.C. Cir. 1998) (Exemption 7); *see, e.g.*, *Elec. Frontier Found. v. ODNI*, 639 F.3d 876, 891 (9th Cir. 2010) ("highlight[ing] the need for a fact-specific inquiry under Exemption 5").

Plaintiffs are also incorrect that factual disputes regarding FOIA's exemptions will not be common to multiple Related Actions. Opp. 12–13. Though Plaintiffs claim "it is impossible to know whether Defendants will raise the same claimed exemptions," *id.* at 12, Plaintiffs do not dispute that "different field offices may locate different copies of a particular document." Mem. 10. Plaintiffs cannot explain why CBP headquarters would treat different copies of the same record differently. Nor do Plaintiffs have any answer to Defendants' point that the same threshold factual issues may determine whether entire categories of records may be withheld or redacted, regardless of which offices located records falling into those categories. *See* Mem. 10–11; *see, e.g.*, *Solar Sources, Inc. v. United States*, 142 F.3d 1033, 1039–40 (7th Cir. 1998) (identifying circumstances in which "generic exemptions of categories of documents" are warranted).

Finally, Plaintiffs assert that Defendants merely "speculate about issues that may arise." Opp. 8. Plaintiffs' decision to file suit before CBP has completed its processing of records does make it hard to predict exactly what factual issues will arise regarding the adequacy of CBP's

search and its application of the statutory exemptions. But the foregoing discussion of the parties' different views on how these issues should be approached must cast doubt on Plaintiffs' self-serving statement that they "do not anticipate any" "factual disputes." *Id.* at 1. And the Panel's prior decisions in FOIA MDLs establish that the commonality of "a potential issue" regarding search adequacy is enough to justify centralization. *Church of Scientology* Transfer Order at 2.

III. CENTRALIZATION WOULD SERVE THE PURPOSES OF SECTION 1407

As this Panel held in *Freedom Magazine* and *Church of Scientology*, centralization of multidistrict litigation involving parallel FOIA requests would serve the convenience of parties and witnesses and would promote the just and efficient conduct of such actions. Mem. 11–14.

Significantly, Plaintiffs do not dispute that centralization would allow both Plaintiffs and Defendants to staff the litigation more leanly, which benefits taxpayers who may be required to cover both sides' litigation costs. *See id.* at 13. Plaintiffs' contention that centralization would be "inconvenient" because "[e]ach case has counsel within its jurisdiction," Opp. 17, ignores that centralized litigation could be handled by fewer attorneys and that defense counsel are in D.C.

Plaintiffs also fail to address the problems that will arise when Plaintiffs ask thirteen judges to dictate the pace of CBP's release of records. Mem. 12–13. Plaintiffs do not deny that those requests are coming or that centralization would prevent such problems from arising. And Plaintiffs nowhere explain why it would be more efficient to brief summary judgment thirteen times before thirteen judges, creating the potential for inconsistent rulings on common issues.

Plaintiffs' main arguments that centralization will not be more efficient are that discovery may not be necessary, Opp. 14, that any discovery "would be uniquely local and tailored, relating to the adequacy of the search for and disclosure of the specific records that may exist in each specific jurisdiction," *id.* at 15, and therefore that any witnesses would be located where the cases are now pending, *id.* at 17. But even the potential for discovery warranted centralization in

Freedom Magazine and *Church of Scientology*, and Plaintiffs' contention that any discovery and witnesses would be located in the field is wrong for reasons discussed above. *See supra* at 4–5.

Plaintiffs' remaining arguments are also meritless. Plaintiffs assert that "the number of cases here is small," Opp. 16, but the thirteen FOIA actions here are greater than the eight centralized in *Freedom Magazine*. Plaintiffs say the litigation (which they have staffed with 46 lawyers so far) is "not complex," *id.* at 16, but cannot explain how it is different from the *Freedom Magazine* or *Church of Scientology* litigation. And Plaintiffs' unanimous opposition to centralization, *id.*, should not weigh against transfer when Plaintiffs are affiliated entities that have coordinated a multidistrict litigation strategy for undisclosed reasons of their own.[5]

IV. NO SUPERIOR ALTERNATIVE TO CENTRALIZATION EXISTS

Centralization pursuant to Section 1407 is warranted because its benefits cannot be obtained by other means, such as informal coordination or transfer pursuant to Section 1404.

Informal coordination will not relieve Defendants or the courts of the burdens imposed by Plaintiffs' litigation strategy. Plaintiffs state that "coordination already is occurring amongst the ACLU Affiliates." Opp. 17. But Plaintiffs' coordination amongst themselves does not reduce the burden on the Government of defending itself in thirteen proceedings or reduce the time that thirteen district judges will need to devote to these matters. Moreover, Plaintiffs' approach to the litigation thus far belies their vague representation that Plaintiffs' "counsel commit to continuing

[5] Plaintiffs also cannot rebut Defendants' point (Mem. 12) that the denial of Defendants' transfer motion may require the parties to litigate the potential preclusive effect that a ruling against one ACLU affiliate might have in other Related Actions. Plaintiffs misread *Taylor v. Sturgell*, 553 U.S. 880 (2008), as holding that "Congress never meant to preclude successive actions seeking the same records." Opp. 13. What *Taylor* held was that one FOIA litigant may be bound by a judgment against another if the defendant can establish any of six generally applicable grounds for nonparty preclusion. *See* 553 U.S. at 904–07. Given Plaintiffs' admitted coordination and uniform requests that CBP release records to the same person, there is a sound basis for Defendants' suggestion that decentralized litigation will raise questions of privity and issue preclusion that may themselves necessitate discovery. *See id.*

to make every effort possible to minimize any duplication and reduce inefficiencies." *Id.* at 17–18.[6]

Plaintiffs correctly do not suggest that transfer pursuant to Section 1404 presents a feasible alternative. Section 1404 authorizes transfer "to any other district or division where [an action] might have been brought or to any district or division to which all parties have consented." 28 U.S.C. § 1404(a). Because Plaintiffs oppose transfer, Section 1404 would authorize transfer only to the District of Columbia—the only forum in which all of the Related Actions "might have been brought"—and Section 1407 offers a more efficient path to that result.

V. THE MICHIGAN ACTION SHOULD BE TRANSFERRED IN ITS ENTIRETY

The Panel should reject Plaintiffs' suggestion that one part of the Michigan action should remain in the Eastern District of Michigan even if the other part of that action is centralized with all of the other Related Actions. Plaintiffs' proposal fails as a matter of law because Section 1407 only authorizes the Panel to transfer "actions" in their entirety. 28 U.S.C. § 1407(a); *see In re Polychloroprene Rubber (CR) Antitrust Litig.*, 360 F. Supp. 2d 1348, 1351 n.2 (J.P.M.L. 2005) ("28 U.S.C. § 1407 only permits actions (not claims) to be transferred by the Panel . . . ."). Occasionally the Panel simultaneously orders transfer of an action and remands one or more particular claims to the transferor court. *See* Manual on Complex Litigation § 20.131, at 220 (4th ed. 2004). But the ACLU of Michigan's Complaint does not present separate claims for each of its two FOIA requests, *see* Exhibit 10, Compl. ¶¶ 50–63, *ACLU of Mich. v. DHS, et al.*, No. 5:17-cv-11149 (E.D. Mich.), so there is no separate claim that could be remanded.

[6] For example, to reduce the time consumed by communications between counsel, Defendants requested that Plaintiffs designate one or two attorneys to serve as liaison counsel. *See* Exhibit 18. Plaintiffs refused that invitation, insisting that "DOJ will need to correspond directly with lead attorneys for each case to resolve any pretrial issues that arise," *id.*—notwithstanding Plaintiffs' own designation of one attorney to serve as lead counsel for all of them before this Panel. ECF No. 45.

Whatever its discretion to do otherwise, the Panel should transfer the entire Michigan action. Both ACLU of Michigan requests seek records from CBP's Detroit Field Office and seek substantially identical categories of records.[7] Plaintiffs fail to explain why the same records would not be responsive to both requests or why the search methodology for each would need to be different. Moreover, to the extent that disputes about CBP's responses to Plaintiffs' requests arise after CBP has processed the responsive records, Plaintiffs could ask the transferee court to consider a partial remand at that time.

VI. THE DISTRICT OF COLUMBIA IS THE MOST APPROPRIATE FORUM

Plaintiffs prefer transfer to the Eastern District of Virginia, the District of Maine, or the Western District of Washington, but they largely fail to address Defendants' arguments in favor of the District of Columbia. *See* Opp. 19–20; Mem. at 14–17.

Plaintiffs ignore the multiple factors that make D.C. an appropriate forum for any FOIA MDL: that Congress has designated it as an all-purpose forum for FOIA litigation; that its judges have substantial expertise in FOIA litigation; that it is most convenient for the Government; and that its Local Rules facilitate efficient processing of FOIA actions. *See* Mem. at 14–15.[8]

Plaintiffs nevertheless remarkably assert that "the District of Columbia is not an acceptable choice" for FOIA litigation because it "processes cases slowly." Opp. 19. The aggregate caseload statistics on which Plaintiffs rely, however, do not reflect how efficiently

[7] Both requests, for instance, seek Detroit Field Office "[r]ecords containing the 'guidance' that was 'provided to DHS field personnel shortly' after President Trump signed the Executive Order" and Detroit Field Office records "concerning CBP's interpretation, enforcement, and implementation" of various Executive Branch issuances and court orders. The records responsive to these requests are likely to overlap substantially if not entirely.

[8] PACER Case Locator searches for actions filed in 2016 and coded on the civil cover sheet with the Nature of Suit code for FOIA litigation (Code 895) indicate that only *one* such action was filed in the District of Maine, *four* in the Western District of Washington, and *six* in the Eastern District of Virginia. By contrast, *252* such actions were filed in D.C.

various courts process *FOIA cases*, which, as discussed, the District Court for the District of Columbia handles with expertise and efficiency.[9]

Plaintiffs also do not address most of the case-specific factors raised by Defendants. Mem. 15–17. CBP's centralized coordination of its responses to Plaintiffs' requests favors transfer to D.C., *see id.* at 15–16; *Freedom Magazine* Transfer Order at 2, as does the fact that Plaintiffs coordinated their FOIA requests with the national ACLU, which has an office there, *see* Mem. 16. Plaintiffs protest that none of the Related Actions is pending in D.C. and that "responsive records are not located there," Opp. 19, but as discussed above, this ignores that one of the ACLU's coordinated FOIA requests seeks records from CBP headquarters.[10]

Finally, Plaintiffs' identification of their preferred transferee courts only after learning which judges have been assigned to their cases in each jurisdiction creates the appearance not only of forum-shopping but of judge-shopping. Centralization in D.C., where the parties do not know which judge would handle the litigation, would eliminate that concern.

CONCLUSION

Defendants respectfully request that their Motion for Transfer be granted.

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[9] Plaintiffs neglect to mention that the median time from filing to disposition in the District of Columbia (8.0 months) is below the national median (8.5 months) and only marginally higher than the medians in Plaintiffs' preferred districts. *See* U.S. Courts, Federal Court Management Statistics: United States District Courts — National Judicial Caseload Profile (June 2016), http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0630.2016.pdf. Plaintiffs also highlight the number of pending cases per judge in their preferred districts while failing to disclose that the number in D.C. (251 cases) is substantially lower than in the Eastern District of Virginia and the Western District of Washington. *Id.*; Opp. 19–20.

[10] Further, because all potential tag-along actions could be filed in D.C., Mem. 14, transfer there could permit their coordination with the Related Actions without further action by the Panel.

Dated: June 6, 2017

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