

1 (In open court.)

2 (Clerk places telephone call.)

3 THE CLERK: Good morning, everyone. This is Sandy
4 with Judge Durkin. If you want to hold the line, the judge
5 will be with us momentarily.

6 MS. POLETTO: Thanks, Sandy.

7 THE CLERK: Thank you.

8 (Pause in proceedings.)

9 THE CLERK: All rise.

10 Be seated, please.

11 Okay. This is 17 C 4782, Boundaoui v. FBI.

12 THE COURT: All right. Good morning. Let's have
13 everyone on the phone identify themselves, then the people in
14 court identify themselves.

15 MS. POLETTO: Good morning, your Honor. This is Alexa
16 Poletto for the plaintiff.

17 MS. SOWLES: This is Marcia Sowles for the defendants.
18 I'm an attorney at the Department of Justice.

19 THE COURT: All right.

20 MS. ABRAHAM: Christina Abraham for the plaintiff.

21 MS. BOUNDAOUI: And this is Assia Boundaoui, the
22 plaintiff.

23 THE COURT: All right. Good morning, everyone.

24 MS. BOUNDAOUI: Good morning.

25 THE COURT: All right. Before the Court are two

1 motions, defendant -- defendants FBI and DOJ's motion for an
2 *Open America* stay and plaintiff Assia Boundaoui's motion to
3 compel expedited processing of her Freedom of Information Act
4 request for FBI records concerning the antiterrorism
5 investigation in the Chicago suburbs known as Operation Vulgar
6 Betrayal.

7 Addressing the stay motion first, defendants request a
8 stay of proceedings pursuant to 5 U.S.C. § 552(a)(6)(C) and
9 *Open America v. Watergate Special Prosecution Force*,
10 547 F.2d 605, a D.C. Circuit case, 1976.

11 Instead of complying with FOIA's ordinary 20-day --
12 20-working-day timeline for determining whether to comply with
13 a FOIA request, defendants ask for a stay that would allow them
14 to review and process documents on a 500-page-per-month
15 schedule. This schedule would mean that production would not
16 end in this case for over five years.

17 FOIA permits an exception to the ordinary timeline
18 only if the government can show exceptional -- quote -- "[i]f
19 the Government can show exceptional circumstances exist and
20 that the agency is exercising due diligence in responding to
21 the request." That's 5 U.S.C. § 552(a)(6)(C)(i), *accord Open*
22 *America*, 547 F.2d at 616.

23 The Court finds that defendants have not shown either
24 (1) due diligence or (2) exceptional circumstances.

25 As to due diligence, it has been almost a year since

1 plaintiff filed a FOIA request. And defendants have not
2 produced a single record to date. This is not due diligence.

3 In *Government Accounting -- Accountability Project v.*
4 *U.S. Department of Health and Human Services*, 568 F.Supp.2d 55,
5 pages 63 and 64 -- it's a district court -- D.C. District
6 Court, 2008 -- for example, the Court found that an agency
7 failed to demonstrate due diligence based on its poor dealing
8 with plaintiff in particular, including substantial delays in
9 responding to the plaintiff's FOIA request.

10 As to exceptional circumstances, by definition
11 "exceptional circumstances" do not "include a delay that
12 requests from a predictable agency workload of requests under
13 this section, unless the agency demonstrates reasonable
14 progress in reducing its backlog of pending requests." That's
15 5 U.S.C. § 552(a)(6)(C)(ii).

16 But the circumstances set forth in defendants' motion
17 for a stay and David M. Hardy's supporting affidavit -- which
18 is at the record -- record cite 35 -- amount to high volumes of
19 requests and backlog. And rather than showing "reasonable
20 progress in reducing its backlog," defendants note that the
21 backlog is becoming worse. And that's record -- that's the
22 affidavit at paragraph 38. This is predictable, as are the
23 delays that increased requests cause, absent some extraordinary
24 measure defendants would need to take, of which there's no
25 evidence.

1 As the many cases cited in plaintiff's opposition to
2 defendants' stay motion make clear, courts regularly deny *Open*
3 *America* stays in situations like this, finding that a backlog
4 and high volumes of requests are not exceptional circumstances
5 justifying a stay. Indeed, if these circumstances did qualify
6 as exceptional, then defendants would be in a constant state of
7 "exceptional circumstances" and would never be held accountable
8 to meet FOIA's statutory requirements.

9 Defendants note that the plaintiff's requests require
10 multiple agency reviews and heavy redactions. But this is the
11 nature of all requests for sensitive documents and is not by
12 itself unexpected.

13 Much of defendants' argument focused on the -- focuses
14 on the unfairness to other FOIA requesters if the plaintiff is
15 given priority through expedited processing. Unfortunately,
16 the Court can only focus on the fairness -- excuse me.
17 Unfortunately, the Court can only focus on the fairness of
18 defendants' treatment of plaintiff, who made a proper and valid
19 request for documents under the FOIA statute. The consequences
20 for other requesters of an order expediting processing of
21 plaintiff's request is something the defendants must address
22 internally with regard to their own allocation of resources.

23 So for the foregoing reasons, the Court denies
24 defendants' motion for a stay.

25 Turning to plaintiff's motion, the Court finds that

1 defendants' anticipated five-year timeline for production is
2 patently unreasonable and plaintiff is entitled to expedited
3 processing.

4 Expedited processing is appropriate where (1) there's
5 "[a]n urgency to inform the public about an actual or alleged
6 Federal Government activity" "made by a person who is primarily
7 engaged in disseminating information" -- that's
8 28 CFR § 16.5(e)(1)(ii) -- and/or the request concerns "[a]
9 matter of widespread and exceptional media interest in which
10 there exist possible questions about the government" -- "about
11 the government's integrity that affect public confidence." And
12 that's also 28 CFR. That's Section 16.5(e)(1)(iv).

13 Plaintiff is an internationally recognized filmmaker
14 who is producing a film informing the public of the FBI's
15 alleged profiling and surveillance of communities based on
16 race, religion, and ethnicity, in particular, the Arab American
17 community in Bridgeview. Significant questions about privacy
18 rights are implicated by plaintiff's project.

19 Defendants contend that because the investigation was
20 closed ten years ago, plaintiff's request has no current
21 urgency. The issues attendant to such an investigation in fact
22 have extraordinary relevance to today's society. To compare
23 plaintiff's request to the request for information on the
24 investigation of the death of Princess Diana is ludicrous. And
25 to characterize the public interest as simply a generalized

1 concern over unwarranted surveillance ignores the specific
2 nature of the surveillance and the targets at issue.

3 The Court finds that these circumstances meet the
4 standards for expedited processing.

5 As the cases in plaintiff's motion for expedited
6 processing make clear, courts regularly impose review and
7 production schedules ranging from 1,500 to 10,000 pages per
8 month upon the government in FOIA actions after finding an
9 expedited schedule warranted.

10 Here the Court orders defendants to produce Volumes 1
11 through 5 and 5(a), which is approximately 1,649 pages prior to
12 applicable exemptions, by October 16th, 2017; review all
13 remaining nonexempt documents responsive to plaintiff's
14 September 26, 2016, FOIA request on a rolling basis of
15 3,500 pages per month beginning the month of October 16, 2017,
16 to November 16, 2017; and give priority to the subfiles of
17 individuals for whom plaintiff provides privacy waivers on or
18 before October 16th, 2017.

19 Court further orders that plaintiff pay the required
20 fees on or before October 16, 2017. Any issue of whether the
21 fees should be waived and thus reimbursed to plaintiff should
22 be addressed on summary judgment.

23 To the extent plaintiff seeks to challenge the FBI's
24 search identifying 33,120 pages of relevant documents involving
25 the Operation Vulgar Betrayal criminal investigation and seeks

1 review of documents beyond those identified documents, the
2 Court finds that issue likewise should be addressed in the
3 context of a motion for summary judgment, and the expedited
4 processing need not include such documents.

5 Finally, defendants contend that being specific in
6 narrowing plaintiff's requests would result in faster
7 processing. Defendants say there's no index they can provide
8 to plaintiff to help her narrow her request.

9 I can't order the production of an index that does not
10 exist. But it would seem in the government's best interests to
11 create even a rudimentary index to allow the plaintiff to
12 prioritize, which may lead to a narrowing of the requests and
13 then ultimately decrease the burden on defendants.

14 The parties should provide monthly written status
15 reports reporting on the compliance with this order. The first
16 report will be due on October 20th, 2017.

17 That's the order of the Court.

18 We will issue a minute order, likely not with all of
19 the justifications I just provided, but to give you the dates
20 and the specifics as to the production requirements so there's
21 no ambiguity. You don't need to order up the transcript to get
22 that. That will be in a minute order I'll issue today.

23 Are there any questions?

24 (No response.)

25 THE COURT: All right.

1 THE CLERK: Defendant also had a motion --

2 MS. POLETTO: On behalf of the plaintiff, no, your
3 Honor. Thank you.

4 THE CLERK: Defendant had a motion up for relief from
5 MIDP that was filed. What are you doing with that?

6 THE COURT: There was --

7 MS. SOWLES: The -- your Honor, it's not with respect
8 to the -- your order. But I did have a concern the plaintiff
9 is preparing -- or is submitting privacy waivers. And I've --
10 and the best method for doing that is actually the old-
11 fashioned method of making hard copies. And we will get an
12 address that they should be mailed to and can be mailed to
13 overnight.

14 But that's the best because trying to send them
15 electronically or on hard drives, there's concern at the FBI
16 about use of hard drives from outside sources and because of
17 viruses and other matters.

18 So I would just like to, yeah, for the record state
19 that.

20 THE COURT: All right. Well, Ms. Poletto, you should
21 follow through on it using the form of transmission suggested
22 by the government. It's in everyone's --

23 MS. POLETTO: Absolutely.

24 THE COURT: -- best interests -- everyone's best
25 interests to get this done expeditiously.

1 MS. ABRAHAM: That's not a problem.

2 THE COURT: Also, there's a motion --

3 What was it, Sandy?

4 THE CLERK: It was defendants' motion for relief from
5 standing order regarding mandatory initial discovery pilot
6 project.

7 THE COURT: Oh, that's granted. This is not that type
8 of case.

9 THE CLERK: Okay.

10 THE COURT: So that that motion for relief from the
11 mandatory disclosure requirements under our new standing order
12 on discovery is granted.

13 All right. I don't think there's a need to come back
14 to court on this. There is a need, obviously -- which I've
15 just stated -- for you to make monthly reports.

16 If either side feels that there's a need to come to
17 court to report on any snags in this process, just contact my
18 courtroom deputy, and we'll have you in for a quick status.

19 MS. ABRAHAM: Yes, your Honor.

20 THE COURT: All right. Anything else from anyone,
21 government or plaintiff?

22 MS. ABRAHAM: Nothing from the plaintiff, your Honor.
23 Thank you.

24 THE COURT: Okay. And anything else from the
25 government?

1 MS. SOWLES: No. I just was wondering whether your
2 order will be a written order or just from the transcript so in
3 case there's questions from the FBI as far as getting a full --
4 I mean, I made notes and have it, but I just was wondering.

5 THE COURT: No. It will likely be the oral
6 justifications I've just given, with a short minute order with
7 deadlines and dates. But you can certainly order the
8 transcript if you want.

9 MS. SOWLES: Okay. Thank you, your Honor.

10 THE COURT: All right. Thank you all.

11 MS. BOUNDAOUI: Thank you, your Honor.

12 MS. ABRAHAM: Thank you, your Honor.

13 MS. POLETTO: Thank you, your Honor.

14 (Concluded at 8:58 a.m.)

15 C E R T I F I C A T E

16 I certify that the foregoing is a correct transcript of the
17 record of proceedings in the above-entitled matter.

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19 /s/ LAURA R. RENKE
20 LAURA R. RENKE, CSR, RDR, CRR
Official Court Reporter

September 30, 2017

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