UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Leonard Peltier

Plaintiff,

v.

Federal Bureau of Investigation

Defendant.

Civil No. 02-4328 (DWF/SRN)

ORDER

Barry A. Bachrach and Michael Kuzma, Esq., on behalf of Plaintiff

Preeya M. Noronha, Esq., on behalf of Defendant

SUSAN RICHARD NELSON, United States Magistrate Judge

The above entitled matter came before the undersigned United States Magistrate Judge on Plaintiff's Motion for a Vaughn Index (Doc. No. 5) and Defendant's Motion for a Stay of Proceedings (Doc. No. 11). These matters have been referred to the undersigned for resolution of pretrial matters pursuant to 28 U.S.C. § 636 and Local Rule 72.1.

For the reasons set forth below, Plaintiff's motion is denied without prejudice and Defendant's motion is granted as modified herein.

This case involves Plaintiff's request for approximately 47,000 pages of documents from the Federal Bureau of Investigation (FBI). Plaintiff submitted Freedom of Information Act (FOIA) requests to the FBI Chicago and Minneapolis field offices in August of 2001. (Compl.

¶5). After some correspondence between the parties,[1] Plaintiff initiated the present lawsuit on November 15, 2002 seeking injunctive relief under the Freedom of Information Act, 5 U.S.C. § 552 et seq. Thereafter, Plaintiff filed a motion for a Vaughn index, Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), detailing the documents withheld and the reasons therefor. Defendant responded by moving for a stay allowing for additional time to respond to Plaintiff's request pursuant to 5 U.S.C. § 552(a)(6)(C), otherwise known as an Open America stay. Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976).

I. DISCUSSION

Under FOIA, an agency must determine whether to comply with a request for records within 20 days of the receipt of a request. 5 U.S.C. § 552(a)(6)(A)(i). A federal court, however, may allow an agency additional time to complete its review of records and respond to a request "[i]f the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request." 5 U.S.C. § 552(a)(6)(C)(i). The Eighth Circuit does not appear to have considered the application of § 552(a)(6)(C).

Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976), which this Court follows as a guide, is the leading case interpreting and applying § 552(a)(6)(C). Open America held:

> "[E]xceptional circumstances exist" when an agency, like the FBI here, 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

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[1] Plaintiff initially agreed that summaries of the documents would be sufficient, but, upon receipt, Plaintiff found the summaries to be inadequate and incomplete. Thereafter, Plaintiff refused to reduce his request.

> can show that it "is exercising due diligence" in processing the requests. In such situation, in the language of subsection (6)(C), "the court may retain jurisdiction and allow the agency additional time to complete its review of the records." Under the circumstances defined above the time limits prescribed by Congress in subsection (6)(A) become not mandatory but directory.

Id. at 616.

As part of the Electronic Freedom of Information Act amendments of 1996, Congress amended § 552(a)(6)(C) by adding the following two subsections:

> (ii) For purposes of this subparagraph, the term "exceptional circumstances" does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.
>
> (iii) Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing a request (or a modified request) under clause (ii) after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this subparagraph.

Thus, in order to constitute exceptional circumstances, (1) the volume of requests must be greater than that anticipated by Congress; (2) existing resources must be inadequate to deal with the volume of such requests within the time limits of subsection (6)(A); (3) the agency must be exercising due diligence in processing the requests; and (4) the agency must demonstrate reasonable progress in reducing its backlog of requests.[2]

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[2] Plaintiff argues, without citing any authority, that the 1996 amendments superceded the Open America case. This Court disagrees. The amendment actually reaffirmed that delay resulting from agency workload is an exceptional circumstance where the agency demonstrates reasonable progress in reducing its backlog. Moreover, Open America can be sensibly read to include, albeit by different language, this requirement. 547 F.2d at 615 ("We believe also that Congress wished to reserve the role of the courts for two occasions, (1) when the agency was not showing due diligence in processing plaintiff's individual request *or was lax overall in meeting its obligations under the Act with all available resources* . . . .") (emphasis added). Finally, "the fact that Congress amended [§ 552(a)(6)(C) in 1996] without explicitly repealing the established

A. Exceptional Circumstances

In this case, Plaintiff does not dispute that requirements one and two are met. The declaration submitted by Christine Kiefer, on behalf of Defendant, more than satisfies these two requirements. (Kiefer Decl. ¶26-31). For instance, there are 2,015 requests pending at various stages of processing with Defendant. Id. at ¶26. The individual requests in the large queue vary in size from 3,000 to 80,000 pages. Id. at ¶34. Plaintiff's large queue request itself is 45,000 pages. Id. at ¶33. Moreover, during the past five years, Defendant has received 2,961 administrative appeals with 637 appeals pending as of October 2002. Id. at ¶27. Finally, as of December 31, 2002, Defendant was involved in 133 pending lawsuits involving 638 FOIA requests. Id. at ¶27. Such lawsuits, of course, "demand a great deal of time from the Bureau's FOIA department, which consequently decreases the efficiency of processing requests." Johnston v. United States, No. 93-5605, 1994 WL 533908, at *2 (E.D. Pa. Sept. 29, 1994);

[Open America] doctrine itself gives rise to a presumption that Congress intended to embody [Open America] in the amended version of [§ 552(a)(6)(C)]." Lindahl v. Office of Pers Mgmt., 470 U.S. 768, 782-83 (1985). Indeed, this Court "need not rely on the bare force of this presumption here, however, because the legislative history" of the 1996 amendment, for what legislative history is worth, provides some evidence that Congress was "well aware of the [Open America] standard, amended [§ 552(a)(6)(C)] on its understanding that [Open America applied to exceptional circumstances] generally, and intended that [Open America] review continue except to the extent [qualified] by [§ 552(a)(6)(C)(ii)]." Id. See H.R. Rep. 104-795, 104th Cong., 2d Sess., 1996 U.S.C.C.A.N. 3448, 1996 WL 532690, at *23 (Sept. 17, 1996) (The bill would clarify that routine, predictable agency backlogs for FOIA requests do not constitute exceptional circumstances for purposes of the Act. This is consistent with the holding in Open America v. Watergate Special Prosecution Force . . . ."). In any event, the above generated test plainly takes into account the requirements of the amendments and the germane directives of Open America.

(Kiefer Decl. ¶27). In addition, Defendant's counsel explained at the hearing on this matter that the FBI's overall resources have been particularly strained given a recent directive by the Attorney General and Director of the FBI reallocating resources toward counterterrorism.

Defendant is also exercising due diligence in processing requests. As the Kiefer declaration fully explains, Cecola v. F.B.I., No. 94-4866, 1995 WL 143548, at *5 (N.D. Ill. 1995) ("[Q]uestions of an agency's diligence are generally resolved on the basis of affidavits. . . ."), the Records Management Division (RMD) was formed in 2002 following the FBI's reorganization. Id. at ¶12. The RMD handles all FOIA and Privacy Act requests through the Record/Information Dissemination Section (RIDS). Id. The RIDS process requests as follows. The Service Request Unit "perfects" the FOIA request by initially reviewing requests, sending acknowledgment letters, seeking more identifying data from requesters so an accurate search can be performed, and advising requesters that no documents were found. Id. at ¶14(a). Then, two Work Process Units prepare "perfected" FOIA requests for transfer to the Disclosure Units by conducting searches of the general indices for responsive documents, forward files for classification review, retrieve and forward files for duplication, respond to status inquiries, handle administrative appeals, and address fee issues. Id. at ¶14(b). Next, three Disclosure Units obtain the records from the Work Process Units and perform the actual processing of records under FOIA. Id. at ¶14(b)-(c). In 1997, the FBI instituted a three-track processing system. Id. at ¶15, p.4 n.2. Requests are assigned on a first in/first out basis from the Work Processing Units to one of the three queues depending on the size of the request–the small queue is for requests of 500 pages or less, the medium queue is for 501-2,500 pages, and the large queue is for more than 2,500 pages. Id. at ¶15. Requesters in the large queue are given the opportunity to reduce their

request in order to be assigned to a smaller, faster moving queue. Id.; § 552(a)(6)(C)(iii). Once actual processing of a request begins, Paralegal Specialists conduct a page-by-page, line-by-line review of responsive documents to determine if a FOIA exemption applies and make necessary redactions and notations. Id. at ¶16(a)-(c). During processing of a request, the Paralegal Specialists typically are required to consult with other agencies to determine if exemptions apply or to refer documents to the agency of origin. Id. at ¶18-19. In addition, processing may be interrupted to resolve a classification issue or find missing records. Id. at ¶19. Finally, responsive documents are duplicated, checked for legibility, and released to the requester. Id. at ¶16(d).

The Court finds that the FBI is processing requests with due diligence. See Open America, 547 F.2d at 616 (finding that the FBI was exercising due diligence in processing requests); Fisher v. F.B.I., 94 F.Supp.2d 213, 218 (D.Conn. 2000) (same); Schweihs v. F.B.I., 933 F.Supp. 719, 722 (N.D. Ill. 1996) (same); Ohaegbu v. F.B.I., 936 F.Supp. 7, 8 (D.D.C. 1996) ("In view of this two track system and the large volume of documents expected to be responsive to plaintiff's request, this Court finds that the FBI has met the due diligence requirement for a stay."); Aguilera v. F.B.I., 941 F.Supp.144, 148-49 (D.D.C. 1996) (finding that the FBI was exercising due diligence in processing requests); see also Appleton v. F.D.A., 254 F.Supp.2d 6, 9-10 (D.D.C. 2003) (holding that a the FDA was exercising due diligence in similar circumstances); Williams v. F.B.I., 2000 WL 1763680, at *1 (D.D.C. Nov. 30, 2000) (plaintiff did not even challenge the FBI's diligence or reasonable progress in reducing backlog).

Plaintiff's main contention is that Defendant has not been diligent in processing his particular requests. Plaintiff's argument appears to be that Defendant has not diligently

processed his particular request because Defendant should have produced the requested documents at Defendant's trial or in response to a previous FOIA request. A brief history of Defendant's connection with the FBI, the "notoriously convoluted procedural history" of his other cases, United States v. Peltier, 189 F.Supp.2d 970, 971 (D.N.D. 2002) (detailing more fully the procedural history of Plaintiff's cases), and why he seeks documents in the FBI's Minneapolis and Chicago field offices about himself is in order.

In 1977, Plaintiff was convicted of murdering, via execution style shooting, or aiding and abetting the first degree murder of two FBI agents and sentenced to two consecutive life sentences. United States v. Peltier, 585 F.2d 314, 318-319 (8th Cir. 1978), cert. denied, 440 U.S. 945 (1979). Defendant's conviction was affirmed on direct appeal. Id. In 1982, after he requested and received documents pursuant to FOIA, Plaintiff filed his first motion under 28 U.S.C. § 2255 for a new trial. United States v. Peltier, 553 F.Supp. 890, 893 (D.N.D. 1982). Plaintiff argued that some of the FOIA documents were exculpatory, and the government's suppression of those documents violated his right to due process and Brady v. Maryland, 373 U.S. 83 (1963). Peltier, 553 F.Supp. at 893. The district court denied Plaintiff's motion. Id. at 903. The Eighth Circuit affirmed in part and remanded in part for an evidentiary hearing to consider the effect of a certain FOIA document relating to a .223 shell casing. United States v. Peltier, 731 F.2d 550 (8th Cir. 1984). The district court again denied Plaintiff's § 2255 motion. The Eighth Circuit, although explaining that the "prosecution withheld evidence from the defense favorable to Peltier," ultimately affirmed the district court and held that no Brady or Bagley violation occurred. United States v. Peltier, 800 F.2d 772, 775, 780 (8th Cir. 1986). In 1991, Plaintiff filed another § 2255 motion asserting, among other arguments, that the government had

conceded at a prior oral argument that his conviction could not be sustained on the theory that he personally shot the agents, but this argument was rejected and the motion was denied. Peltier v. Henman, 997 F.2d 461, 465 (8th Cir. 1993).

Plaintiff's allegation that Defendant has not been diligent in processing his requests because the responsive documents should have been produced by the government twenty-six years ago at his trial fails. First, the argument is misguided in that it fails to address the diligence of Defendant in responding to this particular request. As explained, Defendant is plainly processing Plaintiff's current request with due diligence. Second, Defendant was not a party to Plaintiff's criminal trial. See Kyles v. Whitley, 514 U.S. 419, 437 (1995) ("[T]he prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" [of a different outcome] is reached."). Finally, Plaintiff is merely speculating that requested documents should have been produced at his trial twenty-six years ago, and this Court is in no position to countenance such speculation.

Plaintiff's allegation that the documents requested in this case should have been produced when Plaintiff made a previous FOIA request sometime between 1977 and 1982 is without foundation. There is no evidence before this Court that Plaintiff made the same request of the same party in his previous FOIA request.

In addition, the fact that Plaintiff refuses to modify the scope of his request supports a finding of exceptional circumstances. 5 U.S.C. § 552(a)(6)(C)(iii).

Finally, Defendant has made reasonable progress in reducing its backlog of pending requests. In 1996, the total number of pending requests at FBI Headquarters was 16,244. (Kiefer

Decl. ¶26). Defendant repeatedly sought additional funding from Congress to create more FOIA response positions. Id. at ¶28. In 1997 and 1998, Congress appropriated additional funds for 129 and 239 additional employees. Id. All new employees were in place by 1999. Id. In addition to adding personnel, Defendant had implemented other tools to accelerate processing. For instance, Defendant has begun utilizing on-line computer searches to locate responsive documents. Id. at ¶29. A new computer program that allows electronic processing of documents, as opposed to manual/paper review, is currently being installed by contractors and Defendant is using those portions of the program that have been installed. Id. at ¶30. These actions as well as others have reduced Defendant's pending requests to 2,015 as of February 10, 2003. Id. at ¶31. The Court is satisfied that Defendant has made *reasonable* progress in reducing its backlog. Defendant has actively sought and implemented new programs and methods to accelerate the processing of requests, and such programs have worked. Moreover, "'[r]easonable progress,' . . . does not require that annual backlog reductions be uniform." Appleton, 254 F.Supp.2d at 10 n.4. This is especially true when the reduction in backlogs does not depend entirely on the diligence of an agency's efforts. Rather, an agency could be working at maximum capacity and exercising maximum diligence yet still not reduce backlogs at all (or they could easily increase) if the public lobs a multitude of requests or particularly massive requests (such as an 80,000 page request currently pending before the FBI as well as Plaintiff's 45,000 page large queue request) at the agency.[3]

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[3] The principle is elementary. A team of horses can only pull so much weight. If the farmer adds too much weight to the wagon, no matter how hard the horses pull they will not be able to get the wagon to market on time. Of course, the farmer can take a horse from the field and add it to the team, but that will only reduce the efficiency of cultivation in the field. To have

Thus, exceptional circumstances exist. Even if this Court found that exceptional circumstances did not exist, the remedy would not be launching Plaintiff's requests to the front of the line absent the significant showing that he is entitled to expedited processing. As Open America explained:

> [E]ven those with the dimmest of eyesight could look ahead a few months and see that the regulation of priorities in all agencies, not just the FBI, would very shortly become the function of the courts. If everyone could go to court when his request had not been processed within thirty days, and by filing a court action automatically go to the head of the line at the agency, we would soon have a listing based on priority in filing lawsuits, i.e., first into court, first out of the agency. This would be nothing but an inflation of a simple administrative request to a United States district court action, and like inflation in the monetary world would ultimately profit no one, since no one would be assigned a priority position any different than he would achieve if all applicants were left to the priorities fixed by the agency.

547 F.2d at 615.

In Donham v. United States Dep't of Energy, 192 F.Supp.2d 877, 883-884 (S.D. Ill. 2002),[4] the court found that exceptional circumstances did not exist but refused to arbitrarily move the plaintiff to the front of the line. Agreeing with Open America, Donham explained that "granting a preference to litigants over other FOIA requestors would result in an unfair and inefficient first

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true efficiency, the farmer simply needs to buy another horse. See Cohen v. F.B.I., 831 F.Supp. 850, 854 (S.D. Fla. 1993) (explaining that a court "cannot focus on theoretical goals alone, and completely ignore the reality that these agencies cannot possibly respond to the overwhelming number of requests received within the time constraints imposed by FOIA").

[4] In also criticizing the Open America approach to exceptional circumstances, the Donham court explained that simply having a backlog of requests cannot constitute exceptional circumstances. 192 F.Supp.2d at 881. As this Court explained, supra Part II, Open America is the guide with the specific command of the statute as a supplement. The Donham court explicitly agreed with the Open America approach to diligence. 192 F.Supp.2d at 882.

to sue, first served system." Id. at 883. The Donham court ended up simply ordering the agency to produce some records at or after the time the agency suggested it would complete its processing and to submit a proposed schedule of when it would complete processing of other records. Id. at 884. Another court held that no exceptional circumstances existed but found that it could not award *any* remedy. Caifano v. Wampler, 588 F.Supp. 1392, 1394-95 (N.D. Ill. 1984). The Caifano court stated:

> In short, we find ourselves in a troubling position, and one that is unique in our experience: whether or not defendants have violated the ten-day response provision of the FOIA, there is nothing we can do at this time to give plaintiff relief, or to vindicate any rights he may have. We can only direct that defendants continue to work diligently and expeditiously in a good faith manner to respond to plaintiff's requests.

Id.

B. Expedited Processing

Plaintiff may be entitled to expedited processing of his request if he can show a "compelling need." 5 U.S.C. § 552(a)(6)(E)(i)(I). A compelling need is shown where "a failure to obtain requested records on an expedited basis . . . could reasonably be expected to pose an imminent threat to the life or physical safety of an individual." § 552(a)(6)(E)(v)(I). A requestor, of course, has the burden to show a compelling need. Id.; see, e.g., Open America, 547 F.2d at 616 (explaining that expedited processing may be appropriate where the "plaintiff can show a genuine need and reason for urgency in gaining access to Government records ahead of prior applicants for information").

Section 552(a)(6)(E)(i) authorizes an agency to establish regulations regarding expedited processing of requests. 28 C.F.R. § 16.5(d)(3) provides that "[a] requester who seeks expedited

processing must submit a statement, certified to be true and correct to the best of that person's knowledge and belief, explaining in detail the basis for requesting expedited processing." See also § 16.5(d)(2) (directing where the request should be made).

Neither party disputes that "exhaustion of remedies is required in FOIA cases." Dettmann v. United States Dep't of Justice, 802 F.2d 1472, 1476 (D.C. Cir. 1986). Defendant submits that "[t]he FBI's records of correspondence in this case do not indicate that Peltier at any time requested expedited processing of his Chicago and Minneapolis field office FOIA requests." (Keeley Decl. ¶15). Plaintiff argues that he did request expedited processing of the FOIA requests "which are ultimately at issue in this case." (Bachrach Aff. ¶4). Plaintiff submitted requests made by a different attorney in 2000 as evidence of requesting expedited processing. Id.

The Court is not satisfied that Plaintiff has exhausted his administrative remedies in connection with requesting expedited processing of his requests in this case. As is clear from the Complaint, Plaintiff submitted the requests in this case on August 22, 2001 and August 23, 2001 to the Minneapolis and Chicago Field Offices. (Compl. ¶5). Plaintiff does not argue that he requested expedited processing for the requests in this case. Rather, Plaintiff argues that the requests for expedited processing made in connection with a separate request in 2000 should count for his current requests. The Court cannot accept this argument. First, for whatever reason, it appears that the requests submitted by attorney Jennifer Harbury (who does not represent Plaintiff in this matter) in 2000 have been abandoned. In any event, such requests are not at issue in this matter. Second, there is no evidence that the separate 2000 request requested

documents from the Chicago Field Office.[5] Third, throughout Plaintiff's correspondence with Defendant regarding the requests in this case (the August 2001 requests), Plaintiff never mentioned anything about expedited processing. Indeed, the requests in this case (Compl. ¶5, Ex. A and B) do not seek expedited processing or claim that requests for expedited processing had been previously made. Finally, exhausting administrative remedies for one request simply does not count towards another request. C.f. Dettmann, 802 F.2d at 1477 ("It is likewise clear that a plaintiff may have exhausted administrative remedies with respect to one aspect of a FOIA request--and thus properly seek judicial review regarding that request--and yet not have exhausted her remedies with respect to another aspect of a FOIA request.").

Given the record before the Court, Defendant should be given the first opportunity to consider whether Plaintiff's requests should be processed expeditiously so as to allow the orderly administration of justice in federal court to proceed, if necessary, upon a fully developed record. 5 U.S.C. § 552(a)(6)(E)(iii) ("Agency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner to such a request shall be subject to judicial review under paragraph (4), except that the judicial review shall be based on the record before the agency at the time of the determination."). Exhaustion is a necessary step. Plaintiff shall submit an appropriate request for expedited processing to Defendant in accordance with § 552(a)(6)(E) and 28 C.F.R. § 16.5(d). The Court

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[5] The only actual request, in connection with the separate 2000 request, produced by Plaintiff appears to have been sent to the Sioux Falls, South Dakota FBI office. Plaintiff neither produced a request made to the Minneapolis office nor the Chicago office. Plaintiff did produce a response from the Minneapolis FBI office that indicates the request made to the Sioux Falls office was also made to the Minneapolis office.

notes that the time line for deciding whether to grant expedited processing is short, and, if such time line is not adhered to, Plaintiff may proceed to federal court.

Thus, with respect to the Chicago documents, this matter is stayed until December 31, 2003. With respect to the Minneapolis documents, this matter is stayed until December 31, 2005. After exhausting administrative remedies, Plaintiff may, if necessary, request appropriate relief from this Court. 5 U.S.C. § 552(a)(6)(E)(iii).

Two issues remain. First, Plaintiff argues that Defendant should be forced to submit his field office records to the National Archives and Records Administration (NARA) because Defendant initially proposed to do so as a way to settle this matter. (Def.'s May 22, 2003 Letter, at 1-2, 2 n.1); (Keeley Decl.). Defendant ultimately refused to stipulate to such an agreement because the responsive documents contain law enforcement information that, if produced, could reasonably be expected to interfere with current enforcement proceedings. The Court finds no authority for forcing Defendant to transfer the responsive documents to NARA, and Plaintiff offers none. Plaintiff appears to attempt to point out Defendant's refusal to stipulate to transferring the documents to NARA as a dilatory tactic, but this argument is without merit as this Court requested Defendant to inquire into the possibility of transfer to NARA as a means of resolving this matter.

Second, initially the Chicago Field Office identified responsive documents to be over 2,500 pages, and the Minneapolis Field Office identified approximately 45,000 pages of responsive documents. Both requests were placed in the large queue. (Kiefer Decl. ¶34). Subsequently, the Chicago documents were counted page-by-page, and it was determined that the Chicago documents consist of 2,425 pages. (Keeley Decl. ¶12). The Chicago documents

were then placed in the medium queue. Id. Defendant has stated that "the FBI will *release* all portions of those 2,425 pages not subject to withholding *by* December 31, 2003," (Def.'s May 22, 2003 Letter, at 2 n.2) (emphasis added), as the Chicago documents are "now assigned for processing in the medium queue." (Def.'s March 20, 2003 Letter, at 3 n.2). Thus, the Chicago documents were initially placed in the wrong queue. It is unclear when they were placed in the medium queue whether the Chicago documents assumed the position they would have been in had they been placed in medium queue from the outset. The Court orders Defendant to submit a report clarifying this matter. In addition, the Court orders Defendant to release processed documents in piece-meal fashion in thirty day intervals once processing of the Chicago documents has commenced. There is "no reason why plaintiff should have to wait until defendant has completed review of all and necessarily the last requested document before he may obtain the first requested and reviewed document," Hinton v. Federal Bureau of Investigation, 527 F.Supp. 223, 225 (E.D. Pa. 1981), and Defendant appears to concur.

Defendant explains that processing of the Minneapolis documents (45,000 pages) will begin not later than December of 2004 (Keeley Decl. ¶14), and will be completed by December of 2005. (Def.'s May 22, 2003 Letter, at 2 n.2). Defendant explains it will begin "interim releases of the Minneapolis Field Office documents not subject to withholding in early 2005." Id. Although Defendant agrees to provide interim releases, the Court nonetheless orders Defendant to release processed Minneapolis documents in sixty day intervals once processing of the Minneapolis documents has commenced.

Finally, the Court orders Defendant to submit progress reports every four months from the date of this order until the processing of Defendant's requested documents is complete. See

Pray v. F.B.I., 1995 WL 764149, at *2 (S.D.N.Y. Dec. 28, 1995). Each report shall include an estimated date for satisfaction of Plaintiff's request. There shall be no change in the orderly advancement of processing the Chicago documents or queue position of the Minneapolis documents while Plaintiff seeks expedited processing from Defendant.

C. Vaughn Index

At this time, the Court denies Plaintiff's request for a Vaughn Index. The case of Vaughn v. Rosen, 484 F.2d 820, 826-28 (D.C. Cir. 1973), established that agencies processing FOIA requests and releasing documents must prepare "detailed indexes itemizing each item withheld, the exemptions claimed for that item, and the reasons why the exemption applies to that item." Lykins v. United States Dep't of Justice, 725 F.2d 1455, 1463 (D.C. Cir. 1984). Defendant has not yet processed Plaintiff's request. Thus, there is nothing for Defendant to prepare. Plaintiff's request is simply premature, and it is denied. E.g., Edmonds, 959 F.Supp. at 5 ("It would make no sense to require the government to produce a Vaughn Index before the government has processed Plaintiff's FOIA request."); Fox v. United States Dep't of Justice, 1994 WL 923072, at *3 (C.D. Cal. Dec. 14, 1994) ("Because the request has not yet been processed, a Vaughn Index is not necessary.").

THEREFORE, IT IS HEREBY ORDERED that:

1. Plaintiff's Motion for a Vaughn Index (Doc. No. 5) is **DENIED WITHOUT PREJUDICE**.

2. Defendant's Motion for a Stay of Proceedings (Doc. No. 11) is **GRANTED** as modified herein. After Plaintiff exhausts his administrative remedies consistent with this Order, the stay of proceedings may, if necessary, be revisited.

Dated: August 15, 2003

SUSAN RICHARD NELSON
United States Magistrate Judge