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**UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
MISSOULA DIVISION**

AMERICAN CIVIL LIBERTIES)
UNION)

125 Broad Street—18th Floor)
New York, NY 10004,)

Case No. CV 18-154-M-DWM

AMERICAN CIVIL LIBERTIES)
UNION FOUNDATION)

125 Broad Street—18th Floor)
New York, NY 10004,)

**PLAINTIFFS' PRELIMINARY
PRETRIAL STATEMENT**

AMERICAN CIVIL LIBERTIES)
UNION OF MONTANA)
FOUNDATION, Inc.)

P.O. Box 9138)
Missoula, MT 59807,)

Plaintiffs,)

v.)

DEPARTMENT OF DEFENSE)

1400 Defense Pentagon)
Washington, DC 20301,)

DEPARTMENT OF HOMELAND)
SECURITY)

Washington, DC 20528)

DEPARTMENT OF THE INTERIOR)

1849 C Street, N.W.)
Washington, DC 20240)

DEPARTMENT OF JUSTICE)

950 Pennsylvania Avenue,)
N.W.)

Washington, DC 20530,)

Defendants.

Plaintiffs by and through their counsel of record hereby submit this Preliminary Pretrial Statement pursuant to this Court’s order of November 20, 2018,¹ Fed. R. Civ. P. 26(a)(1), and L.R. 16.2(b)(1).

(A) Brief Factual Outline of the Case

On January 23, 2018, Plaintiffs submitted identical FOIA requests (the “Request”) to the Federal Bureau of Investigation (“FBI”) and the Office of Legal Counsel (“OLC”) within the U.S. Department of Justice, the U.S. Army Corps of Engineers (“USACE”), the Bureau of Land Management (“BLM”), and the Department of Homeland Security (“DHS”). On March 8, 2018, Plaintiffs submitted the Request, modified to remove Department of Defense (“DOD”)–specific requests to the Transportation Security Administration (“TSA”) within DHS. On April 2, 2018, upon notice from the FBI that the January 23 submission had been unsuccessful due to a defunct online portal for FBI FOIA requests, Plaintiffs submitted the Request, modified to remove DOD-specific requests, to the FBI.

With respect to all agencies listed above, the Request seeks:

“[R]ecords created since January 27, 2017, concerning

- (1) Legal and policy analyses and recommendations related to law enforcement funding for and staffing around oil pipeline protests. Such recommendations may include, but are not limited to,

¹ Defendants filed a Motion for Extension of Time to File on January 9, 2019. Plaintiffs reserve the right to file an amended Statement in the event that the extension is granted.

declarations of a state of emergency by state and local entities in order to marshal additional funds, and requests by state or local entities for federal agencies to provide funding or personnel for counter-protest operations;

- (2) Travel of federal employees to speaking engagements, private and public meetings, panels, and conferences on the subject of preparation for oil pipeline protests and/or cooperation with private corporations in furtherance thereof;
- (3) Meeting agendas, pamphlets, and other distributed material at speaking engagements, private and public meetings, panels, and conferences where federal employees are present to discuss preparation for oil pipeline protests and/or cooperation with private corporations in furtherance thereof; and
- (4) Communications between federal employees and state or local law enforcement entities or employees thereof, and between federal employees and state or local law enforcement entities or employees thereof, discussion cooperation in preparation for oil pipeline protests.”

Plaintiffs sought a waiver of search, review, and duplication fees on the grounds that disclosure of the requested records is “in the public interest” and because it is “likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). Plaintiffs also sought limitation of fees on the ground that Plaintiffs qualify as “representative[s] of the news media” and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II). Plaintiffs requested expedited processing of the Request on

the basis of a “compelling need” for the requested records as defined in 5 U.S.C. § 552(a)(6)(E)(v)(II).

The agency responses to the Request were as follows:

FBI

The FBI acknowledged receipt of the Request on April 6, 2018 and wrote that Plaintiffs’ request for fee waiver was “under consideration.” In a separate letter also dated April 6, 2018, the FBI wrote that “unusual circumstances” apply to the Request and informed Plaintiffs they could reduce the scope of their Request in order to seek a determination on the Request within 20 days. The FBI denied Plaintiff’s request for expedited processing in a letter dated April 24, 2018. Prior to filing their Complaint, Plaintiffs received no further correspondence from the FBI and no records responsive to the Request were released. Plaintiffs exhausted all administrative remedies because the FBI failed to comply with the time limit for responding to FOIA requests. On January 10, 2019, Plaintiffs received a letter from the FBI dated January 9, 2019 stating that it “can neither confirm nor deny the existence of any records which would tend to disclose the FBI’s preparations, strategy, or available resources for responding to a particular event or activity, including potential protests against the Keystone XL Pipeline.”

OLC

The OLC acknowledged receipt of the Request by letter dated January 31, 2018, and assigned it reference number FY18-058. In that letter, OLC denied Plaintiffs' request for expedited processing, and noted it would make a determination concerning Plaintiff's request for a fee waiver after determining whether fees would be assessed for the Request. On April 25, 2018, Plaintiffs timely filed an administrative appeal from OLC's denial of Plaintiffs' request for expedited processing. By letter dated May 11, 2018, OLC affirmed its denial of Plaintiffs' request for expedited processing. Plaintiffs contacted OLC by phone on May 11, 2018, and an OLC representative said that the Request had been placed in "final review" and that the agency would have a decision on the Request by the end of the following week. Plaintiffs have received no further correspondence from OLC and no records responsive to the Request have been released by OLC. Plaintiffs have exhausted all administrative remedies because OLC has failed to comply with the time limit for responding to FOIA requests, and because OLC has affirmed the denial of Plaintiffs' request for expedited processing.

USACE

USACE acknowledged receipt of the Request by email dated February 12, 2018, and assigned it reference number FP-18-009115. On July 17, 2018, Plaintiffs received a final response from USACE, disclosing seven pages of redacted emails and withholding "one email consisting of five pages" in its entirety. USACE

claims Exemption 6 of the FOIA for the redacted emails, and Exemptions 5, 6, and 7(A) for the withheld email. On August 3, 2018, Plaintiffs appealed USACE's Final Response on the grounds of inadequate search, improper withholding, and improper redaction. Plaintiffs have received no further correspondence from USACE. Plaintiffs have exhausted all administrative remedies because USACE failed to respond to Plaintiffs' appeal within the time required by statute.

DHS

DHS acknowledged receipt of the Request by letter dated January 25, 2018, and assigned it reference number 2018-HQFQ-00539. DHS noted that it had forwarded the Request to component agencies Federal Emergency Management Agency ("FEMA"), the Office of Intelligence and Analysis ("I&A"), and the Federal Law Enforcement Training Centers (FLETC) to determine whether those offices had any equity in the Request. By email dated February 16, 2018, DHS confirmed that "I & A advised that they will be searching for records for your request (FEMA too)."

FEMA

By letter dated January 26, 2018, FEMA acknowledged receipt of the Request and assigned it reference number 2018-FEFO-00405. FEMA denied Plaintiffs' request for expedited processing, and conditionally granted Plaintiffs' request for a fee waiver. FEMA noted it had queried the appropriate FEMA

subcomponent organizations for responsive records. By letter dated March 23, 2018, FEMA stated that it had conducted a comprehensive search of files within FEMA's Region VIII for responsive records, and was unable to identify any responsive records.

On June 14, 2018, Plaintiffs timely filed an administrative appeal of FEMA's determination that it has no records responsive to the Request. Plaintiffs alleged that FEMA had not engaged in an adequate search for these records. FEMA acknowledged Plaintiffs' appeal by letter on June 21, 2018. Plaintiffs have received no further correspondence from FEMA. Plaintiffs have exhausted all administrative remedies because FEMA failed to respond to Plaintiffs' appeal relating to the adequacy of FEMA's search within the time required by statute.

I&A

I&A acknowledged receipt of the Request by letter dated February 16, 2018, and assigned it reference number 2018-IAFO-00149. I&A stated it would search for items (2), (3), and (4) of the Request. I&A granted expedited processing and did not communicate any decision regarding Plaintiffs' requests for a fee waiver and a limitation of fees. Plaintiffs contacted I&A by email on March 27, 2018, inquiring about the status of the Request. Plaintiffs provided I&A with a May 2017 Field Analysis Report, on which I&A collaborated, as an example of the type of record Plaintiffs were seeking in the Request. By email dated June 22, 2018, I&A

issued a final response to Plaintiffs' Request, providing no documents other than a redacted version of the same, unclassified document Requesters had offered to I&A on March 27—nearly three months prior—as an example of the type of document that Requesters were seeking.

On June 28, 2018, Plaintiffs appealed the adequacy of I&A's search, as well as its redactions of an already unclassified, unredacted letter which Plaintiffs themselves had first provided to I&A. I&A acknowledged Plaintiffs' appeal by letter on July 2, 2018. Plaintiffs have received no further correspondence from I&A. Plaintiffs have exhausted all administrative remedies because I&A failed to respond to Plaintiffs' appeal relating to the adequacy of I&A's search within the time required by statute.

TSA

TSA acknowledged receipt of the Request by letter dated March 12, 2018, and assigned it reference number 2018-TSFO-00198. TSA did not communicate any decision regarding Plaintiffs' requests for expedited processing, a fee waiver, and a limitation of fees. By letter dated May 24, 2018, TSA stated that it had conducted a search and no records responsive to Plaintiffs' Request were located.

On June 14, 2018, Plaintiffs timely filed an administrative appeal of TSA's determination that it has no records responsive to the Request. Plaintiffs alleged that TSA had not engaged in an adequate search for these records. Plaintiffs have

received no further correspondence from TSA. Plaintiffs have exhausted all administrative remedies because TSA failed to respond to Plaintiffs' appeal relating to the adequacy of TSA's search within the time required by statute.

BLM

BLM acknowledged receipt of the Request by letter dated January 29, 2018, and assigned it reference number 2018-00388. BLM granted Plaintiffs' fee waiver request, and did not communicate a decision regarding Plaintiffs' request for expedited processing. BLM noted that it had placed the Request into its "Exceptional/Voluminous" track, indicating that it would require more than sixty workdays for processing. Plaintiffs have received no further correspondence from BLM. No records responsive to the Request have been released by BLM. Plaintiffs have exhausted all administrative remedies because BLM has failed to comply with the time limit for responding to FOIA requests.

(B) Basis for federal jurisdiction and for venue in the division

This Court has both subject-matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B). This Court also has subject-matter jurisdiction over this action pursuant to 28 U.S.C. § 1331.

Venue is proper in this District under 5 U.S.C. § 552(a)(4)(B). Venue is proper in this Division under L.R. 3.2(b) and Mont. Code Ann. § 25-2-125, as

Missoula County is where Plaintiff American Civil Liberties Union of Montana's primary office is located.

(C) Factual basis of each claim

The factual basis for each of Plaintiff's claims against Defendants is set forth above.

(D) Legal theory underling each claim

Claim I – Defendants' failure to promptly make available requested records constitutes a violation of 5 U.S.C. § 552(a)(3)(A) and Defendants' corresponding regulations. This claim applies to all eight agencies listed above.

Congress's use of the word 'shall' in issuing directives to agencies in support of the overarching mandate to make records 'promptly available,' instructs courts that Congress contemplated meaningful agency engagement upon receipt of a FOIA request. Agencies initially have a month to determine whether records can be made available in light of nine statutory exemptions, and have several ways to obtain additional time to respond to requests.

Jud. Watch, Inc. v. U.S. Dep't of Homeland Sec., 895 F.3d 770, 775 (D.C. Cir. 2018) (citations omitted); *see also Env'tl. Prot. Agency v. Mink*, 410 U.S. 73, 93 (1985); *McGehee v. Cent. Intelligence Agency*, 697 F.2d 1095, 1101 (D.C. Cir. 1983). Defendants have far exceeded the maximum allowable time to respond to Plaintiffs' Request and/or administrative appeals and provide requested records.

Claim II – Defendants failure to grant Plaintiffs' request for fee waivers constitutes a violation of 5 U.S.C. § 552(a)(4)(A). Plaintiffs requested fee waivers

on the grounds that disclosure of the requested records is “in the public interest” and because it is “likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). Plaintiffs also requested fee waivers on the grounds that they qualify as “representative[s] of the news media” according to 5 U.S.C. § 552(a)(4)(A)(ii)(II). This claim applies to I&A, TSA, FBI, and OLC. Denial of the fee waivers also violated Defendants’ corresponding regulations. *See* 6 C.F.R. § 5.11(d) (2016) (DHS FOIA fee waiver rule) and 28 C.F.R. § 16.10(k) (2017) (DOJ FOIA fee waiver rule).

- i. The Request is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the ACLU.*

Credible media and other investigative accounts underscore the substantial public interest in the records sought through this Request. Given the ongoing and widespread media attention to this issue, the records sought will significantly contribute to public understanding of an issue of profound public importance. *See, e.g.,* Heather Brady, *4 Key Impacts of the Keystone XL and Dakota Access Pipelines*, National Geographic, Jan. 25, 2017, <https://bit.ly/2D0wNQo>; Michael McLaughlin, *Keystone XL Protestors Won’t Back Down After Trump Approval*, Huffington Post, Mar. 24, 2017, <https://bit.ly/2AFcIgZ>; Paul Hammel, *Nebraska Law Enforcement, Keystone XL Pipeline Foes Prepare for Possible Protests*,

Omaha World-Herald, Apr. 11, 2017, <https://bit.ly/2ADFkH4>. Because little specific information about cooperation between federal, state, and local law enforcement entities and between federal entities and private security companies around anticipated pipeline protests is publicly available, the records sought are certain to contribute significantly to the public's understanding of what type of efforts the federal government is undertaking in preparation for protests against the Keystone XL pipeline.

The ACLU is not filing this Request to further its commercial interest. As described above, any information disclosed by the ACLU as a result of this FOIA Request will be available to the public at no cost. Thus, a fee waiver would fulfill Congress's legislative intent in amending FOIA. *See Jud. Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) ("Congress amended FOIA to ensure that it be liberally construed in favor of waivers for noncommercial requesters." (quotation marks and citation omitted)).

- ii. The ACLU is a representative of the news media and the records are not sought for commercial use.*

The ACLU meets the statutory and regulatory definitions of a "representative of the news media" because it is an "entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." 5 U.S.C. § 552(a)(4)(A)(ii)(III); *see also Nat'l Sec. Archive v. U.S. Dep't. of Def.*,

880 F.2d 1381, 1387 (D.C. Cir. 1989) (finding that an organization that gathers information, exercises editorial discretion in selecting and organizing documents, “devises indices and finding aids,” and “distributes the resulting work to the public” is a “representative of the news media” for purposes of the FOIA); *Serv. Women’s Action Network v. Dep’t of Def.*, 888 F. Supp. 2d 282 (D. Conn. 2012) (requesters, including ACLU, were representatives of the news media and thus qualified for fee waivers for FOIA requests to the Department of Defense and Department of Veterans Affairs); *ACLU of Wash. v. U.S. Dep’t. of Justice*, No. C09–0642RSL, 2011 WL 887731, at *10 (W.D. Wash. Mar. 10, 2011) (finding that the ACLU of Washington is an entity that “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience”); *ACLU v. U.S. Dept. of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C 2004) (finding non-profit public interest group to be “primarily engaged in disseminating information”). The ACLU is therefore a “representative of the news media” for the same reasons it is “primarily engaged in the dissemination of information.”

Furthermore, courts have found other organizations whose mission, function, publishing, and public education activities are similar in kind to the ACLU’s to be “representatives of the news media” as well. *See, e.g., Cause of Action v. Internal Revenue Serv.*, 125 F. Supp. 3d 145 (D.C. Cir. 2015); *Elec. Privacy Info. Ctr. v.*

U.S. Dep't. of Def., 241 F. Supp. 2d 5, 10–15 (D.C. Cir 2003) (finding non-profit public interest group that disseminated an electronic newsletter and published books was a “representative of the news media” for purposes of the FOIA); *Nat'l Sec. Archive*, 880 F.2d at 1387; *Jud. Watch, Inc. v. U.S. Dep't. of Justice*, 133 F. Supp. 2d 52, 53–54 (D.D.C. 2000) (finding Judicial Watch, self-described as a “public interest law firm,” a news media requester).

On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU as a “representative of the news media.” As was true in those instances, the ACLU meets the requirements for a fee waiver here.

Claim III – Defendants’ failure to grant Plaintiffs’ requests for expedited processing on the basis of “compelling need” constitutes a violation of 5 U.S.C. § 552(a)(6)(E)(I) and Defendants corresponding regulations. This claim applies to FEMA, FBI, and OLC.

In 1996, Congress amended ...[FOIA]... to make available a path or expedited process of certain requests. Expedited requests will be “taken out of turn,” a departure from the ordinary first-in, first-out practice of processing FOIA petitions. In Electronic FOIA, Congress directed “[e]ach agency” to “promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records” in two circumstances: first, in “cases in which the person requesting the records demonstrates a compelling need,” and, second, in “other cases determined by the agency” [...]

Agency decisions whether to deny or grant a request for expedited processing are subject to judicial review. Judicial review “shall be based on the record before the agency at the time of the determination.” The standard of judicial review depends on the basis of the agency decision. Courts apply *de novo* review to regulations issued pursuant to Electronic FOIA's “compelling need” prong.

Oversight v. U.S. Dep’t. of Justice, 292 F. Supp. 3d 501,505, 506 (D.D.C. 2018) (citations omitted); *see also Al-Fayed v. Cent. Intelligence Agency*, 254 F.3d 300, 307 n.7 (D.C. Cir 2001). “Under FOIA, requests should be expedited where the requester shows a ‘compelling need’ for the relevant information, meaning that (1) the requester is ‘primarily engaged in disseminating information’ and (2) there is an ‘urgency to inform the public concerning actual or alleged Federal Government activity.’” *Protect Democracy Project, Inc. v. U.S. Dep’t. of Def.*, 263 F. Supp. 3d 293, 298 (D.D.C. 2017) (citations omitted).

- i. The ACLU is an organization primarily engaged in disseminating information in order to inform the public about actual or alleged government activity.*

The ACLU is “primarily engaged in disseminating information” within the meaning of the statute. Obtaining information about government activity, analyzing that information, and widely publishing and disseminating that information to the press and public are critical and substantial components of the ACLU’s work and are among its primary activities. *See ACLU v. Dep’t. of Justice*, 321 F. Supp. 2d at 29 n.5 (finding

non-profit public interest group that “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience” to be “primarily engaged in disseminating information”).

- ii. The records sought are urgently needed to inform the public about actual or alleged government activity.*

These records are urgently needed to inform the public about actual or alleged government activity. Specifically, the requested records relate to forthcoming cooperation between federal, state, and local law enforcement entities and between federal law enforcement entities and private security companies around preparations for protests against the Keystone XL pipeline. Oil pipelines, protests against them, and law enforcement’s responses to these protests are the subject of widespread public controversy and media attention. The records sought relate to a matter of widespread and exceptional media interest in planned oil pipelines, protests against them, and law enforcement responses to these protests.

Given the foregoing, the ACLU has satisfied the requirements for expedited processing of this Request.

Claim IV – Pending final agency responses to the Plaintiffs’ Request and/or administrative appeals, Plaintiffs reserve the right to challenge the adequacy of Defendants’ searches pursuant to 5 U.S.C. § 552(a)(3)(C), (D) and Defendants corresponding regulations.

(E) Computation of damages

Plaintiffs are not seeking damages in this case. If Plaintiffs substantially prevail, they intend to seek reasonable attorneys' fees pursuant to 5 U.S.C. § 552(a)(4)(E)(i).

(F) Pendency or disposition of any related state or federal litigation

There is not currently any related state or federal litigation pending or disposed. Plaintiff ACLU of Montana has filed several related Right to Know requests to state and local entities and reserves the right to file suit based on those requests, if necessary and appropriate. Plaintiffs will notify the court if and when related litigation is commenced.

(G) Proposed additional stipulations of fact

The factual basis for this case is stated above and documented in correspondence between Plaintiffs and Defendants. Plaintiffs reserve the right to propose additional stipulations of fact if necessary and appropriate under established standards.

(H) Proposed deadlines related to joinder of parties or amendment of the pleadings

Plaintiffs do not intend to join any other parties, but reserve the right to amend the Complaint based on Defendants' disclosure of additional requested documents.

(I) Identification of controlling issues of law suitable for pretrial disposition

Resolution of this action will involve interpretation of 5 U.S.C. § 552(a), and Defendants' corresponding regulations and application of relevant case law to the facts stated above, as supplemented if necessary and appropriate. Therefore, this action may be resolved without a trial by cross-motions for summary judgment.

(J) Information on individuals known or believed to have information that may be used in proving claims

The factual basis for this case is stated above and documented in correspondence between Plaintiffs and Defendants. Plaintiffs reserve the right to request information on individuals known or believed to have information that may be used in proving claims.

(K) Substance of any insurance agreement that may cover any judgment

Plaintiffs seek only declaratory and injunctive relief and (if applicable) reasonable attorneys' fees.

(L) Status of any settlement discussions

No settlement discussions have occurred to date. Plaintiffs are willing to engage in settlement discussions as part of a pretrial conference pursuant to this Court's order of November 20, 2018, Fed. R. Civ. P. 26(f), and L.R. 16.2(b)(2).

(M) Suitability of special procedures

None.

Date: January 10, 2019

Respectfully,

/s/ Emerson Sykes

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of January, 2019, a true and correct copy of the above and foregoing document was duly served upon the following counsel of record and interested parties by CM/ECF:

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