UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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AMERICAN CIVIL LIBERTIES UNION and THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Plaintiffs,

v.

15 Civ. 1954 (CM)

DEPARTMENT OF JUSTICE, including its components the Office of Legal Counsel and Office of Information Policy, DEPARTMENT OF DEFENSE, DEPARTMENT OF STATE, and CENTRAL INTELLIGENCE AGENCY,

Defendants.

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR PARTIAL MODIFICATION OF THE SCHEDULING ORDER

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MEMORANDUM OF LAW IN SUPPORT OF PARTIAL MODIFICATION OF THE SCHEDULING ORDER

Defendants respectfully move the Court for relief from the requirement set forth in the Court's April 30, 2015 scheduling order to submit early *Vaughn* indexes by July 17, 2015, in advance of the submissions due on September 30, 2015. *Vaughn* indexes are typically submitted with the government's summary judgment motion, although they are sometimes submitted earlier in order to facilitate a negotiated resolution of some or all issues. Here, it is unlikely that the preliminary *Vaughn* indexes will lead to a negotiated resolution; nor do we believe that plaintiffs (collectively, the "ACLU") need *Vaughn* indexes in order to prepare their submission due August 28, 2015, concerning potential waiver of applicable exemptions. Given the breadth of the ACLU's request and the volume of potentially responsive records, which may well exceed the volume of records at issue in the other case before this Court, the government respectfully submits

that the agency time and resources that would be necessary to prepare preliminary *Vaughn* indexes would be more efficiently used to search for and process the responsive records. The requested modification will also allow the agencies to allocate resources to prepare the *in camera* submission required by the Court in its April 30 scheduling order, which, along with the government's motion for summary judgment, is due by September 30, 2015. For these reasons, as set forth in more detail below, Defendants ask the Court to grant the limited relief sought in this motion.[1]

BACKGROUND

The instant lawsuit filed by the ACLU originated from FOIA requests seeking records from the Central Intelligence Agency ("CIA"), the Department of Defense ("DOD"), the Department of State, and the Department of Justice (including its components, the Office of Legal Counsel ("OLC") and the Office of Information Policy ("OIP")). *See* Compl. ¶¶ 11–42. In particular, the ACLU requested from Defendants documents pertaining to:

> (1) "the legal basis in domestic, foreign, and international law upon which the government may use lethal force against individuals or groups";
>
> (2) "the process by which the government designates individuals or groups for targeted killing";
>
> (3) "before-the-fact assessments of civilian or bystander casualties in targeted-killing strikes and any and all records concerning 'after action' investigations into individual targeted-killing strikes"; and
>
> (4) "the number and identities of individuals killed or injured in targeted-killing strikes."

Id. ¶ 17.

On April 30, 2015, this Court issued a scheduling order in this matter. *See* ECF No. 16. The Court directed each of the defendant agencies to submit *Vaughn* indexes addressing the

[1] The undersigned conferred with counsel for the ACLU before filing this motion, and were advised that the ACLU opposes the government's request and intends to file a brief response.

documents withheld in full or in part by July 17, 2015. *Id.* ¶ 1. The Court also ordered the ACLU to submit "a brief and exhibits indicating each and every Public Disclosure on which they intend to rely to argue" that the government has waived certain FOIA exemptions. *Id.* ¶ 2. Moreover, the Court instructed defendants to provide *in camera* a "document-by-document presentation," along with their motion for summary judgment, by September 30, 2015. *Id.* ¶ 3.

Following consultations between the parties, the ACLU has agreed to narrow and stay prongs (3) and (4) of its request to the CIA, pending the final resolution of litigation in the U.S. District Court for the District of Columbia, in which the ACLU has sought similar records under FOIA relating to casualties and the district court recently granted summary judgment to the government. *See ACLU v. CIA*, Case No. 1:10-cv-00436 (RMC), --- F. Supp. 3d ----, 2015 WL 3777275 (D.D.C. June 18, 2015). Excluded from the ACLU's agreement, however, are any records concerning "after action" investigations into the strike that killed Abdulrahman al-Aulaqi. In addition, the ACLU's agreement to a stay does not apply to defendant agencies other than the CIA.[2]

ARGUMENT

THE COURT SHOULD MODIFY THE PORTION OF SCHEDULING ORDER REQUIRING EARLY *VAUGHN* INDEXES

Defendants respectfully request a limited modification to the current schedule that would excuse the defendant agencies from having to create early *Vaughn* indexes by July 17, 2015.

[2] The government was prepared to move to stay prongs 3 and 4 of the ACLU's FOIA request to the CIA, given that the ACLU is seeking substantially similar records and information in the D.C. litigation. As a result, the agency declarations filed herewith indicate that they are provided in support of defendants' motion to stay the proceedings in part and for partial modification of the scheduling order. However, in light of the ACLU's consent to stay in substantial part prongs 3 and 4 of their request to the CIA, the instant motion addresses only the government's request for partial modification of the scheduling order.

The government often submits an index in FOIA litigation to satisfy its burden of proof. *See generally Halpern v. FBI*, 181 F.3d 279, 290–91 (2d Cir. 1999); *Citizens for Responsibility & Ethics in Wash. v. FEC*, 711 F.3d 180, 187 n.5 (D.C. Cir. 2013); *ACLU v. CIA*, 710 F.3d 422, 433–34 (D.C. Cir. 2013); *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). Typically, an agency produces a *Vaughn* index or declaration with its dispositive motion, and not before. *See, e.g.*, *Citizens for Responsibility & Ethics in Wash.*, 711 F.3d at 187 n.5 (explaining that *Vaughn* indexes can be required only as part of the summary judgment process); *Miscavige v. IRS*, 2 F.3d 366, 369 (11th Cir. 1993) ("Generally, FOIA cases should be handled on motions for summary judgment, once the documents in issue are properly identified. The plaintiff's early attempt in litigation of this kind to obtain a *Vaughn* Index . . . is inappropriate until the government has first had a chance to provide the court with the information necessary to make a decision on the applicable exemptions."); *Schwarz v. Dep't of Treasury*, 131 F. Supp. 2d 142, 147 (D.D.C. 2000) ("The requirement for detailed declarations and *Vaughn* indices is imposed in connection with a motion for summary judgment filed by a defendant in a civil action pending in court." (footnote omitted)); *City & Cnty. of Honolulu v. EPA*, No. 08-00404 SOM-LEK, 2009 WL 973154, at *1–2 (D. Haw. Apr. 9, 2009) (declining to order agency to produce *Vaughn* index prior to filing summary judgment motion); *United States Committee on Refugees v. Dep't of State*, No. 91- 3303, 1992 WL 35089, *1 (D.D.C. Feb. 7, 1992) ("the preparation of a Vaughn index is unwarranted before the filing of dispositive motions in FOIA actions because the filing of a dispositive motion, along with detailed affidavits, may obviate the need for indexing the withheld documents" (internal quotation marks and citation omitted)); *Stimac v. Dep't of Justice*, 620 F. Supp. 212, 213 (D.D.C. 1985) ("the preparation of a *Vaughn* Index would be premature before the filing of dispositive motions").

Accordingly, there is generally no requirement to produce a *Vaughn* index before a motion for summary judgment.

Further, it is unlikely that preparing preliminary indexes would be the most productive and efficient use of the defendant agencies' time and resources, given the other substantial submissions the Court has ordered. On some occasions, the government has agreed to create a draft *Vaughn* index so as to facilitate narrowing of the issues when plaintiffs indicate a willingness to forego claims to certain documents based on the public descriptions to be provided in the draft. Based on the subject matter of these requests, and the need to include only unclassified information on any index provided to the ACLU, it seems unlikely that unclassified *Vaughn* indexes will lead to a significant narrowing of the outstanding disputes. In fact, at least one defendant agency—the CIA— is unlikely to have many, if any, unclassified records; as evidenced by the submissions in the related ACLU case in this Court, any unclassified CIA *Vaughn* index can contain only limited public information and is particularly unlikely to be helpful in limiting the scope of this litigation.[3]

Moreover, any narrowing can likely be accomplished by the parties through the identification of general categories of responsive documents that can be excluded from the

[3] The ACLU's counsel has indicated a belief that such indexes could be helpful if, for example, the indexes permitted the ACLU to request information about specific strikes. Although the document review is ongoing and the indexes are not complete, it is highly unlikely that any *Vaughn* description would contain the identity of particular strikes (beyond information already publicly available) because in context strike-by-strike descriptions, if any, would be likely to reveal classified information. *See ACLU v. CIA*, 2015 WL 3777275, at *10 (holding that ACLU's request for "explicit details on U.S. drone strikes that would be 'sufficient to show the identity of the intended targets, assessed number of people killed, dates, status of those killed, agencies involved, the location of each strike, and the identities of those killed if known' . . . could reveal the scope of the drone program, its successes and limitations, the 'methodology behind the assessments and the priorities of the Agency' and more," and expressing "no doubt that this kind of detail would reveal intelligence activities, sources, and methods and is properly protected under Exemption 1"); Declaration of John Bies, dated June 18, 2015, at ¶ 21.

agencies' searches and processing, which would not necessitate a document-by-document accounting in the *Vaughn* indexes. The ACLU and the defendant agencies have successfully utilized this approach in the past. For example, the ACLU in the D.C. litigation agreed to limit its requests to final legal memoranda and, as discussed above, four types of final intelligence products. Here, the parties have engaged in similar discussions and exchanged proposals for limiting the requests for various categories of documents, and defendants remain hopeful that this dialogue will lead to a resolution of some of the outstanding issues.

In addition, requiring the government to produce early *Vaughn* indexes is unlikely to materially advance the Court's ultimate goal of concluding this litigation promptly. The same agency personnel in charge of processing the documents responsive to the ACLU's requests are also responsible for creating the draft *Vaughn* indexes and complying with the Court's order requiring a "document-by-document" *in camera* submission by September 30, 2015. *See* Declaration of John Bies, dated June 18, 2015, at ¶¶ 13-14, 17-18; Declaration of John Hackett, dated June 19, 2015, at ¶¶ 16-17; Declaration of Mark Herrington, dated June 18, 2015, at ¶¶ 6-8; Declaration of Douglas Hibbard, dated June 19, 2015, at ¶¶ 13-14. As a consequence, any time spent creating the preliminary indexes will necessarily take away from the search for, review, and processing of responsive records. Similarly, generating the indexes may call into question defendants' ability to file the *in camera* submission in the Court's compressed timeline.[4] The creation of this document will be extraordinarily burdensome, as evidenced by the hundreds of

[4] The State Department conservatively estimates that "thousands" of potentially responsive documents will need to be processed. Hackett Decl. ¶ 13. OIP estimates that it needs to conduct further review of at least 1300 pages of unclassified email, over 500 classified emails, and over 1000 pages of classified paper files, and it has not yet completed a search of unclassified paper files. Hibbard Decl. ¶¶ 9-13. OLC estimates that it has "several thousand" potentially responsive documents requiring review. Bies Decl. ¶ 19.

person hours that went into the preparation of the January and April *in camera* submissions made in the ACLU's other case before this Court. By relieving the defendant agencies from the July 17, 2015 deadline, agency personnel will be able to focus their efforts on searching for, reviewing, and processing the responsive documents and meeting the September deadline, thus leading to an expeditious resolution of this litigation.[5]

Finally, the breadth of the ACLU's FOIA requests and the volume of potentially responsive documents make the creation of comprehensive *Vaughn* indexes by July 17, 2015, infeasible or extremely burdensome. *See* Bies Decl. ¶ 20; Hackett Decl. ¶ 16; Herrington Decl. ¶ 9; Hibbard Decl. ¶ 14.[6] Each defendant agency has a significant caseload of other FOIA requests, other statutory and litigation deadlines on significant matters, and very few personnel who have the necessary security clearances to conduct searches and review and process responsive classified documents. And as mentioned above, the same agency personnel tasked with searching for and processing materials responsive to the ACLU's requests will also be responsible for drafting the *Vaughn* indexes and the *in camera* submissions due September 30, 2015. The new requests require wide-ranging searches to be conducted across many offices by limited personnel with significant other responsibilities, and careful interagency consultation and analysis in order to segregate information that is properly exempt from that which should be disclosed. Any estimate

[5] We also believe that relieving the defendant agencies of the obligation to prepare early *Vaughn* indexes by July 17, 2015, will not materially affect the ACLU's ability to prepare its August 28, 2015 filing concerning waiver. Even without specific information about the documents at issue, the ACLU can gather and put before the Court information concerning any official public statements that have been made about the subjects of its FOIA requests, as it has in the other case pending before this Court.

[6] The burden on the CIA is lessened due to, among other things, the ACLU's agreement to narrow and stay prongs 3 and 4 of its request to CIA, with the exception of any records concerning 'after action' investigations into the strike that killed Abdulrahman al-Aulaqi.

at this point is necessarily rough, but most of the defendant agencies anticipate having at least many thousands of pages to analyze for responsiveness and exemptions. Moreover, for defendants CIA, DOD and OLC, the same agency personnel have also been responsible for responding to this Court's order dated May 12, 2015 (and revised on June 23, 2015) in the other case, which required additional segregability reviews to be completed within 45 days. We also note that on June 23, 2015, the Second Circuit heard argument in the appeal from this Court's September 30, 2014 decision in the ACLU and New York Times cases, *see New York Times Co. v. United States*, Nos. 13-422 (Lead), 13-445 (Con.) (2d Cir.), and both DOJ and agency personnel participated in the preparation for that argument.

CONCLUSION

For all of these reasons, we respectfully request that the Court excuse defendants from having to submit early *Vaughn* indexes by July 17, 2015.

Respectfully,

Dated: New York, New York
June 30, 2015

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