UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ORGANIZATION FOR COMPETITIVE MARKETS, Plaintiff, v. OFFICE OF INSPECTOR GENERAL, USDA, Defendant, and NATIONAL CATTLEMEN'S BEEF ASSOCIATION, Defendant-Intervenor.	)	Civil Action No. 14-1902 (EGS)

PLAINTIFF'S STATUS REPORT[1]

This case is now more than three years old, beset by repeated instances of delays caused by Defendant. *See, for examples*, ECF Nos. 59 and 64. Yet despite jointly agreeing to a briefing schedule (based on the agency's burden of proof in FOIA cases), as reflected in this Court's order of May 15, 2017, Defendants now seek a wholesale briefing do-over. But this case was paused, not restarted; and the pause button was pressed because the Defendant filed with its summary judgment motion entirely new documents that should have been disclosed months earlier pursuant to this Court's March 31, 2017, order (which itself was issued to finally end the records "processing" stage of this litigation after repeated instances of last minute surprise

[1] Pursuant to the Court's order of December 5, 2017, Plaintiff has styled this submission as a Status Report. But given Defendants' election to style their submission as a "motion," the Court may consider this a responsive filing, as well.

disclosures, referrals, reprocessings, and requests for extensions). *See* ECF Nos. 64, 67. Three months later, USDA without explanation for the delay again produced a "new" batch of records, that had been identified as responsive years earlier. *See* ECF No. 68, p. 3 (indicating that new records were part of those identified for processing in this case far back as April 2015).

Defendant has now stated (again) that it "believe[s] there are no further records to produce" (and presumably no further Vaughn changes). *See* ECF No. 68, p. 3. While the history of this case makes one wary of such claims, the path forward from here is to *unpause* proceedings, not *restart* them.

Plaintiffs position is that, as a matter of fairness, further proceedings should take account of the posture the case was in at the time the Court issued the stay, as well as the reasons the stay was necessary. Instead, Defendants have demanded a wholly restarted and entirely reformatted briefing schedule.[2] Defendant and Intervenor should, of course, be permitted to address any new disclosures and redaction explanations introduced since the August motions were filed, but that should be done by conforming their opening summary judgment briefs to cite any cross-referenced Bates documents, and only as otherwise needed to cover any new records produced since August 11, 2017.

Defendants had a full three months to prepare their initial summary judgment motions—and the Court's July 14, 2017, order indicated that it would be "very reluctant" to grant more extension time. But Defendant and Intervenor now propose extensive additional briefing time (cumulatively totaling 20 weeks for opening briefs). *See* ECF No. 69.

[2] That Defendants chose to add a "motion" to their status report is telling of their intent to modify, rather than simply resume, the already established briefing order in this case.

Delays and disruptions of the government's own making should not operate to unfairly secure the briefing extension it was denied last July, nor operate to restart the briefing clock in its entirety. "[T]he interest in judicial finality and economy, which has 'special force in the FOIA context, because the statutory goals—efficient, prompt, and full disclosure of information—can be frustrated by agency actions that operate to delay the ultimate resolution of the disclosure request.'" *August v. Fed. Bureau of Investigation*, 328 F.3d 697, 699 (D.C.Cir.2003) (quoting *Sen. of the Com. of Puerto Rico v. U.S. Dept. of J.*, 823 F.2d 574, 580 (D.C. Cir. 1987)).

USDA has not asserted any actual reason for failing to process the relevant materials by the Court-ordered deadline for production, why undisclosed materials were filed at the same time as its summary judgment motion, or why records in its possession for years are only now being disclosed in the midst of a stayed briefing schedule. *See* ECF Nos. 66 and 68. This pattern of unjustified late disclosures[3]—combined with Defendants' apparent willingness to capitalize on their own delays—rewards government delay with infinite chance for do-overs, rather than adhere to FOIA's special interest in fair and timely resolutions.

To avoid this result, Plaintiff proposes that the pause button be lifted in the case and proceedings resume from where they left off. Plaintiff proposes that the Court order:

1) The stay be lifted and the briefing schedule resumed;
2) The Defendants' opening summary judgment briefs be conformed to cite any cross-referenced Bates documents, and only as otherwise needed to cover any new records produced since August 11, 2017;

[3] This pattern—which has delayed this case numerous times—is yet another reason not to modify the established briefing schedule, so that Plaintiff may have a presumptive assurance of a completed record when preparing its brief.

3) That, consistent with the schedule previously agreed to by the parties, the resumed briefing schedule allow:

4 weeks for Defendant and Intervenor's conforming opening briefs;

5 weeks for Plaintiff's opposition and, if applicable, combined cross-motion for summary judgment;

3 weeks for Defendant and Intervenor's replies and, if applicable, combined oppositions;

3 weeks for Plaintiff's reply, if applicable.

Dated: January 12, 2018

Respectfully submitted,

/s/ Matthew E. Penzer

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