

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

GUN OWNERS OF AMERICA, INC., et al.,

Plaintiffs,

v.

FEDERAL BUREAU OF INVESTIGATION,

Defendant.

Civil Action No. 24-1301 (ACR)

**PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION TO COMPEL**

Defendant does not even begin to justify the so-called “consultation” black hole into which – for well over a year – it has sent virtually all records in this FOIA case.<sup>1</sup> Rather, Defendant demurs that, while it is “diligently processing Plaintiffs’ FOIA request,” “the FBI does not control the pace of the other agencies’ review of records sent to them for consultation....” ECF #18 (“Opp.”) at 3. Thus, Defendant surmises, because “the FBI must await each consult to be returned,” “an order requiring Defendant to release outstanding consultation pages would be premature.” *Id.*

That is plainly not the law. Rather, it is hornbook law that an agency “‘is not absolved of its obligations under FOIA’ to timely produce the requested records solely because it has ‘refer[red] the documents elsewhere’ for consultation.” *NPR v. Dep’t of Treasury*, 2021 U.S. Dist. LEXIS 90170, at \*6 (D.D.C. Mar. 31, 2021) (alteration in original). Yet that is precisely what Defendant asks this Court to do – to absolve the FBI of *its* (and its alone) obligation to produce records, on

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<sup>1</sup> Defendant acknowledges that, while it “has sent approximately 5,482 pages to other government agencies for consultation,” only about “300 pages of records not subject to consultation” have been produced to Plaintiffs. ECF #18 at 1, 3. In other words, not a single page of records sent for consult has been returned by all consulting agencies.

the theory that “the FBI does not control the pace of the other agencies’ review.” Opp. at 3.

But again, Plaintiffs did not sue “other agencies,” they sued the FBI, which has an obligation under FOIA to produce documents. *See generally* 5 U.S.C. § 552. And under the law of this Circuit, a “referral of records could constitute an improper withholding if the ‘net effect [of the consultation process] is significantly ... to increase the amount of time [a requester] must wait to obtain them.’” *Plunkett v. DOJ*, 924 F. Supp. 2d 289, 305 (D.D.C. 2013). At least one court in this district has found that a period of “almost one year” is a “significant period of time.” *Keys v. DHS*, 570 F. Supp. 2d 59, 69 (D.D.C. 2008).<sup>2</sup> Thus, such a lengthy “‘withholding’ ... will be deemed ‘improper’ unless the agency can offer a *reasonable explanation for its procedure*.” *McGehee v. CIA*, 697 F.2d 1095, 1110 (D.C. Cir. 1983) (emphasis added).

Yet even in its response, Defendant offers no “reasonable explanation” for its consultation procedure – it offers no explanation at all. Rather, Defendant reports that it “continues to contact the consulting agencies with outstanding pages in an effort to obtain their return.” Opp. at 3; *see also* ECF #17 at 2 (“Defendant is following up with the consulting agencies periodically”). But simply *asking* for an update is not a “procedure” to ensure records are produced and released. Again, that is what the statute demands of Defendant.

Were it otherwise, then no FOIA record ever would be produced, as an agency could simply refer every responsive document out for consultation – even fraudulently – to some tangential government entity, with the \*wink wink, nod nod\* understanding that those records will never be returned. And “[t]he net effect could be wholly to frustrate the purposes of the Act.” *McGehee*, 697 F.2d at 1109.

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<sup>2</sup> *Cf. Or. Nat. Desert Ass’n v. Gutierrez*, 409 F. Supp. 2d 1237, 1250 (D. Or. 2006) (delay of about six months “did not significantly increase the time to get the records”).

On the contrary, as DOJ's Office of Information Policy makes clear, FOIA requesters should "not [be] disadvantaged by the ... consultation process...."<sup>3</sup> And yet in this case, Defendant started sending records for consult nearly 14 months ago. And as Defendant tells it, *not one* has been fully returned. As defense counsel reports, "22 other government agencies have received consult pages." ECF #18-1 at 3. With that many cats to herd, who knows when – if ever – Defendant will produce anything. *See id.* ("I therefore do not have an estimate for when consult pages will begin to roll out to plaintiff.").

Compounding the problem, Defendant refuses to name the other agencies that purportedly have Plaintiffs' records – "[g]iven that we do not know which agencies will request non-attribution, I am not in a position to provide the consulting agency names or corresponding number of pages." ECF #18-1 at 3. Of course, "the longer the resultant delay in ... obtaining records ... the more substantial must be the offsetting gains offered by the agency to establish the reasonableness of its system." *McGehee*, 697 F.2d at 1110. Defendant has offered *no* such explanation here, much less the sort of "substantial" one that should be required to justify a delay of well over a year (and with no end in sight).<sup>4</sup>

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<sup>3</sup> <https://www.justice.gov/oip/blog/referrals-consultations-and-coordination-procedures-processing-records-when-another-agency>.

<sup>4</sup> Defendant string-cites seven cases declining to resolve portions of FOIA cases "on a piecemeal basis prior to completion of all processing and production." Opp. at 3. But *not one* of these cases dealt with an agency's consult referral leading to delayed production. *See* Minute Order, *Protect Democracy Project, Inc. v. NSA*, No. 1:17-cv-01000-CKK (D.D.C. Apr. 16, 2018) (denying a prematurely filed motion for summary judgment where "Plaintiff ha[d] not given any indication that Plaintiff intended to file such a motion" and "Defendant ... was to make a final production ... more than five weeks beyond Plaintiff's submission"); Minute Order, *Leopold v. DHS*, No. 1:21-cv-00545-TJK (D.D.C. Mar. 6, 2023) (denying a prematurely filed motion for summary judgment where the defendant "finished producing documents" but had not yet "filed its Vaughn declaration and index"); Minute Order, *James Madison Project v. CIA*, No. 1:19-cv-00609-BAH (D.D.C. Dec. 13, 2022) (declining "piecemeal litigation on the application of FOIA exemptions while production is ongoing"); Minute Order, *Bader Family Found. v. U.S. Dep't of Educ.*, No. 1:21-cv-01741-DLF (D.D.C. Oct. 26, 2022) (declining "to address the plaintiff's

One court in this district recently considered a similar case. In *NPR v. Dep't of Treasury*, 2021 U.S. Dist. LEXIS 90170 (D.D.C. Mar. 31, 2021), the Treasury Department “processed over 11,000 pages of responsive records” but “withheld 2,592 pages of Referred Documents of which only 287 [were] later produced after consultation with other stakeholders.” *Id.* at \*3. And when “Treasury ... declined to provide any such estimate or agree to any deadline for production,” the court found that “*it cannot give Treasury carte blanche to let the consultation process play out without any time restraints.*” *Id.* at \*3, \*5 (emphasis added). Thus, the court ordered that “Treasury must detail the[] status [of consultation documents] and provide a concrete timetable for processing and production,” noting that “the Court stands ready to intervene further as necessary to bring this matter to a timely close.” *Id.* at \*7-8.

If that court’s intervention was warranted there, this Court’s intervention is warranted here to an even greater degree. In stark contrast to *NPR*, where only about 23 percent of documents were sent for consult, here Defendant has sent virtually all – about 95 percent – of its responsive records out for consult. And whereas in *NPR* some of the consultation pages had been returned, here *zero* pages have been returned. Thus, “to prevent the information plaintiffs seek from becoming history rather than news” (*NPR*, 2021 U.S. Dist. LEXIS 90170, at \*6 (cleaned up)), this

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arguments as to the adequacy of the search” in a joint status report because “defendant has not yet completed production of records”); *Louise Trauma Ctr. LLC v. DHS*, 2022 U.S. Dist. LEXIS 66691, at \*3 (D.D.C. Apr. 11, 2022) (ordering “a new round of briefing to avoid piecemeal challenges” where an agency “conducted a broader search” and released responsive documents after the plaintiff moved for summary judgment); Minute Order, *Brown v. Dep't of State*, No. 1:15-cv-01459-CKK (D.D.C. Jan. 12, 2018) (declining to address the plaintiffs’ arguments against withholdings under FOIA exemptions while production was ongoing); Minute Order, *Accuracy in Media, Inc. v. DOD*, No. 1:14-cv-01589-LLA (D.D.C. June 23, 2015) (denying a “series of motions” filed “almost immediately” after the parties filed “a proposed schedule for the production of documents”). Again, not one of Defendants’ cases involves the sort of issue here – delayed consultations – an issue courts routinely resolve, because it involves the threshold question of whether the agency is meeting its FOIA duty to produce documents.

Court should order Defendant's "consult" documents be produced within 30 days or, alternatively, should set a fixed timetable for their prompt review and release.

Dated: December 11, 2025

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Stephen D. Stamboulieh, hereby certify that on December 11, 2025, I have caused the foregoing document or pleading to be filed with this Court's CM/ECF system, which generated a notice and delivered the document to all counsel of record.

By: Stephen D. Stamboulieh  
Stephen D. Stamboulieh