

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

GUN OWNERS OF AMERICA, INC.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civ. A. No. 20-206-KBJ
	)	
FEDERAL BUREAU OF INVESTIGATION,	)	
	)	
Defendant.	)	
_____	)	

**DEFENDANT’S MOTION TO STAY PROCEEDINGS**

On behalf of Defendant Federal Bureau of Investigation (“Defendant” or the “FBI”), undersigned counsel respectfully moves for a stay of this matter filed under the Freedom of Information Act (“FOIA”) in lieu of the joint status report presently called for by this Court’s March 27, 2020, Minute Order and for permission to submit a status report, at a time to be determined by means further described below, seeking the stay’s lifting. Plaintiff takes no position as to the motion, but has asked that its separate views be set forth below.

In support of this motion, Defendant states as follows:

1. This case involves Plaintiff’s October 4, 2019, FOIA request to Defendant seeking records relating to the National Instant Criminal Background Check System (NICS). See ECF No. 1. FBI Record/Information Dissemination Section (“RIDS”) had reviewed the request and begun efforts to determine whether it has any information potentially responsive to that request.

2. On March 11, 2020, the World Health Organization publicly characterized COVID-19 as a pandemic.<sup>1</sup> On March 13, 2020, the President declared a National Emergency in an effort to address the spread of COVID-19,<sup>2</sup> and on March 16, 2020, the President announced new guidance to slow the spread of the virus, including avoiding groups of more than 10 people and working or schooling from home whenever possible.<sup>3</sup> This guidance follows recommendations by the Centers for Disease Control and Prevention to engage in social distancing, and, in some circumstances, to close schools.<sup>4</sup> The Office of Personnel Management has been issuing guidance concerning the continuity of Federal Government operations, including recommendations that agencies permit employees to telework.<sup>5</sup> The Office of Management and Budget has asked agencies to “offer maximum telework flexibilities to all current telework eligible employees, consistent with the operational needs of the departments and agencies as determined by their heads.”<sup>6</sup> All

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<sup>1</sup> Centers for Disease Control and Prevention. “Coronavirus Disease 2019 (COVID-19): Situation Summary,” <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html> (last accessed Mar. 19, 2020).

<sup>2</sup> See <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/> (last accessed Mar. 19, 2020).

<sup>3</sup> See The President’s Coronavirus Guidelines for America, [https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20\\_coronavirus-guidance\\_8.5x11\\_315PM.pdf](https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf) (last accessed Mar. 19, 2020).

<sup>4</sup> See Centers for Disease Control and Prevention. “Implementation of Mitigation Strategies for Communities with Local COVID-19 Transmission,” <https://www.cdc.gov/coronavirus/2019-ncov/downloads/community-mitigation-strategy.pdf> (last accessed Mar. 19, 2020).

<sup>5</sup> See United States Office of Personnel Management, “Memorandum for: Heads of Executive Departments and Agencies. Subject: Coronavirus Disease 2019 (COVID-19); Additional Guidance” (Mar. 7, 2020), *available at* <https://www.chcoc.gov/content/coronavirus-disease-2019-covid-19-additional-guidance> (last accessed Mar. 19, 2020).

<sup>6</sup> See Memorandum from the Acting Director of The Office of Management and Budget to the Heads of Departments and Agencies “Updated Guidance for National Capital Region on

schools in the area have been closed. And, most recently, Maryland, Virginia and the District of Columbia have issued Stay-at-Home orders, further emphasizing that on-site work is, with the exception of the smallest category of core functions, no longer possible.

3. RIDS is primarily responsible for processing and producing the non-exempt portions of any responsive records to Plaintiffs. The FBI is implementing the above guidelines to “protect its employees and their communities, and to ensure that it can continue to protect the American people during this national emergency.” Declaration of Michael G. Seidel ¶ 6 (hereinafter, “Seidel Decl.”). RIDS employees have been designated as not mission-critical and were sent home as of March 17, 2020. *Id.* ¶ 8.

4. RIDS employees cannot telework and process records responsive to Plaintiffs' FOIA requests because the systems that they work on are located on FBI's SECRET-level classified enclave. *Id.* ¶ 7. Significantly, RIDS employees conduct most FOIA searches using Sentinel and process documents in the FOIA Document Processing System ("FDPS"), which maintains classified and other sensitive information and is located on the SECRET enclave. *Id.* Although RIDS made efforts to locate potentially responsive records prior to being sent home on March 17, 2020, those efforts were ongoing and cannot be completed until RIDS returns.

5. At RIDS, “no FOIA processing is occurring as of March 17, 2020.” *Id.* ¶ 8. “While RIDS initially anticipated that its staff would return to work on March 30, 2020, the situation has continued to develop. As a result, and subject to continued reassessment, RIDS now anticipates that its staff will return on a limited basis no earlier than April 27,

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Telework Flexibilities in Response to Coronavirus” (Mar. 15, 2020), <https://www.whitehouse.gov/wp-content/uploads/2020/03/M20-15-Telework-Guidance-OMB.pdf> (last accessed Mar. 19, 2020).

2020. (But, given the fluidity of events during this crisis, RIDS return to normal operations may be delayed even further.) For now, “[u]ntil at least April 27, no production of records pursuant to FOIA will be made, whether those productions are in relation to requests in litigation or at the administrative stage....” *Id.*

6. Because RIDS staff is unavailable, Defendant has been unable to complete searches for any potentially responsive records in this case. For this reason, undersigned counsel requests a stay in this matter.

7. If this motion for a stay is granted, undersigned counsel will notify the Court promptly after RIDS employees are able to return to their office.<sup>7</sup> Whether it be on April 27, 2020 (as currently hoped), or some later date, once RIDS returns to normal operations, Defendant will require a period of time to re-adjust, negotiate and harmonize deadlines in its FOIA matters as a result of this disruption which may delay anticipated release dates for a period that exceeds the period during which RIDS was not operational.

8. In addition to the above-described impact on RIDS, the spread of COVID-19 to the region has created profound challenges of achieving an already demanding mission under the current conditions. For example, because numerous Assistant United States Attorneys are now working remotely on a daily basis, teleworking resources (in particular, computing resources) are strained, and technical problems associated with those strains consume time to troubleshoot and resolve.<sup>8</sup> Collaborating in this environment,

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<sup>7</sup> The parties have agreed to remain in periodic contact in the interim, with Defendant agreeing, in particular, to seasonably inform Plaintiff of any further extensions of the timetable for RIDS return to full-time operations.

<sup>8</sup> Indeed, interruptions in VPN access (including reconnection delays) extended, several times over, the cumulative time needed to both to “meet-and-confer” with opposing counsel by detailed email and to draft and file this Motion. Network operations that ordinarily took second, now frequently take minutes. Multiplied over several dozen operations over the network the expanded time’s impact is profound. Undersigned regularly loses two hours of unproductive time per day because of these shortcomings.

including exchanging work-product with agency counterparts is more difficult and less efficient.

9. Because the debilitating inefficiencies of working through the crisis for counsel with dockets approaching 100 active cases would be exacerbated by the creation of additional non-substantive joint filings that mark no status change, undersigned counsel has been proposing a self-executing approach to scheduling in the many cases involving agencies who FOIA offices have been immobilized. To that end, in lieu of a date certain, Defendant requests an opportunity to submit a report on the first Monday that is two weeks after the resumption of RIDS' normal operations. Doing so creates flexibility that accounts for the possibility that the currently-predicted date for RIDS resumption of normal operations is pushed back and provides a short, but necessary, buffer in which to recalibrate priorities and deadlines. Barring unforeseen circumstances, that report will include a request that the stay be lifted.

10. Pursuant to Local Civil Rule 7(m), the undersigned counsel conferred with counsel for Plaintiff in a good-faith effort to determine whether there is any opposition to the relief sought. Plaintiff requested that the following language transmitted in an email from opposing counsel be instead as "Plaintiff's Position:"

"Plaintiff takes no position on the government's motion. However Plaintiff wishes to add its understanding of the FBI's curious procedure in FOIA cases, wherein the FBI takes unclassified documents, places them into a classified system, and then claims its employees cannot access that secure system. In other words, the system that the bureau created, and not the pandemic, is directly to blame for the FBI's alleged inability to process Plaintiff's FOIA request. The effect is a complete shutdown of the FBI's FOIA processing, even while other agencies (such as DOJ) continue work

on similar FOIA requests. COVID-19 should not be a magic talisman for the FBI to waive in order to avoid its duties. Plaintiff would request that any stay the Court might enter be for a set period of time not to exceed 30 days, rather than an open-ended invitation to the bureau to indefinitely delay the processing of Plaintiff's FOIA request."

11. Plaintiff does not oppose Defendant's motion, which is supported by a sworn declaration and reason. As such, it should be granted as made.<sup>9</sup>

12. For the foregoing reasons, Defendant respectfully requests that the Court grant this motion and stay the matter.

Dated: April 20, 2020

Respectfully submitted,

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for the District of Columbia

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<sup>9</sup> Purposeless aspersions of the kind carelessly cast above are best left to wither in their own barren clods. But facts matter. First, the FBI's assertions about the inability to process FOIA requests are neither "claims" nor "alleg[ations]", but unrefuted facts supported by a sworn declaration. Second, the design of the FBI's classified record-keeping system is neither "curious," nor to "blame" for the pause in processing, as if a global pandemic was its very purpose. It is a design shared by several agencies responsible for securely maintaining massive volumes of confidential information – a design committed to the Bureau's considerable discretion. Finally, and worst of all, is the assertion that speaks for itself: "COVID-19 should not be a magic talisman for the FBI to waive (*sic*) in order to avoid its duties." If true, there is but a single consequence of Plaintiff's assertion: RIDS must process records despite COVID-19. Wrong on so many levels, one wonders what it means.



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_____	)	

**[PROPOSED] ORDER**

Upon consideration of Defendant's Consent Motion to Stay, it is hereby ORDERED that this Matter is stayed. Defendant shall file a status report on the first Monday that is two weeks after the resumption of normal operations by the FBI's Record/Information Dissemination Section ("RIDS").

SO ORDERED.

Date: \_\_\_\_\_

\_\_\_\_\_  
United States District Judge